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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney

Petitioners,

-v-

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit err by holding that, on an otherwise proper interlocutory appeal, the jurisdictional question of standing was not properly before the court?

PARTIES

The names of the parties to the proceedings in the court below appear in the caption of this case.*

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*None of the petitioners is a corporation. See Rule 29.6.

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OPINIONS BELOW

The opinion of the court of appeals is reported as Summit Medical Associates v. Pryor, 180 F.3d 1326 (11th Cir. 1999) (App. A). The opinion of the district court is reported as Summit Medical Associates, P.C. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998) (App. B). After the notice of appeal was filed, the district court issued a stay of its proceedings pending resolution of this appeal, and an extensive opinion by the district court related to the issuance of the stay is reported as Summit Medical Associates, v. James, 998 F. Supp. 1339 (M.D. Ala. 1998) (App. C).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued the decision for which petitioners seek review on July 15, 1999 (App. A). The Court of Appeals entered an order denying rehearing and rehearing en banc on September 22, 1999 (App. D). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of Article III, Section 2, of the United States Constitution is set forth in Appendix F. The text of 28 U.S.C. § 1291 is set forth in Appendix G.

STATEMENT OF THE CASE

A. The District Court

The case began with a complaint filed in the U.S. District Court for the Middle District of Alabama in July 1997, before two abortion statutes became operational. The first statute proscribes a procedure known as "partial birth abortion." The second statute criminalizes abortions done on viable unborn children. In general, the Complaint alleges that the statutes are too vague to be enforced. App. 10a.

On the day that the partial birth abortion statute was due to become operative, the Attorney General limited the circumstances under which a criminal prosecution may occur. He did so by letter to the district attorneys in the State's four largest counties: Jefferson, Madison, Mobile and Montgomery. In his letter, the Attorney General directed the district attorneys not to prosecute unless the fetal child was viable. App. 4a.

From the effective date of the partial birth abortion statute until the present, the Attorney General is not aware of any complaints of violations of either statute. There are no investigations, no threatened prosecutions, and no pending prosecutions. There are no known facts under which a prosecution or investigation could proceed at this point under either statute. App. 74a.

The respondents (plaintiffs below) are three abortion providers and one physician. None of the respondents allege an intention or a desire to perform abortions on viable unborn children. The partial birth statute provides for criminal penalties only against "physicians." The statute barring post-viability abortions provides for criminal penalties against "any person." App. 63a.

The Attorney General filed a motion to dismiss and asserted that the Complaint should be barred under the Eleventh Amendment and that there was no Article III case or controversy, particularly because of a lack of standing.[1]

On the Eleventh Amendment issue, the District Court

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[1]The Fourth Circuit, in Richmond Medical Center For Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998), a case involving substantially similar facts, held that plaintiffs who did not perform the kinds of abortions prohibited by Virginia's statute prohibiting partial birth abortions did not face reasonable fear of prosecution and thus lacked standing to challenge the statute.

viewed the case as a "prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law." App. ____. It rejected the view that, in addition to seeking prospective relief, the plaintiffs must allege "an ongoing violation of federal law. . . ." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2046 (1997) (O'Connor, J., concurring in part and concurring in judgment). App. 46a-54a.

In the same order, the District Court also ruled that an Article III case or controversy existed. It refused to dismiss the action for lack of standing, as it said that a credible threat of prosecution existed.

B. The Eleventh Circuit

The petitioners (hereafter, "Attorney General") appealed from the refusal to dismiss the case on Eleventh Amendment immunity grounds. In that appeal, he urged that the District Court should have dismissed the complaint not only on Eleventh Amendment grounds, but also on the ground that the action did not satisfy the case or controversy requirements of Article III, particularly standing. The Court of Appeals was urged to address both of these questions. App. 12a.

The Court of Appeals ruled that the appeal was proper pursuant to 28 U.S.C. § 1291, as it plainly involved a refusal to dismiss on Eleventh Amendment immunity grounds. App. 12a (citing Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)). The court noted that the appealability of a denial of a motion to dismiss on sovereign immunity grounds stems from the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). App. 12a.

When it came to reviewing the District Court's refusal to dismiss for want of standing, the Court of Appeals noted

that justiciability issues are not, in and of themselves, immediately appealable as of right under the collateral order doctrine. App. 13a. The Court of Appeals declined to consider the standing question "as part of a federal court's obligation to satisfy itself that a matter is justiciable." App. 13a-16a. It regarded the reviewability question as controlled by circuit precedent on the doctrine of pendent appellate jurisdiction interpreting this Court's decision in Swint v. Chambers County Commission, 514 U.S. 35, 51 (1995). App. 14a-16a. Thus, the Court of Appeals held that it could rule on the issue of standing only "if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other." Id. The Court of Appeals held that the immunity issue giving rise to the interlocutory appeal could be "resolved" without reaching the questions about standing and, therefore, no responsibility to consider standing existed. App. 15a-16a.

On the merits of the Eleventh Amendment issue, the Court of Appeals ruled that sovereign immunity did not bar the plaintiffs' claims for declaratory relief against the Attorney General, insofar as they related to the criminal penalties. The Ex parte Young exception was deemed controlling. App. 27a-28a. However, the court concluded that Ex parte Young did not authorize the District Court to address claims against the Attorney General about the private civil damages provisions of the partial birth abortion statute, as he lacked any authority to seek damages. App. 27a-28a.

The Court of Appeals therefore affirmed the District Court in part and reversed in part. It remanded with instructions to the District Court to dismiss the challenge to the private civil enforcement provision of the partial-birth abortion statute, but expressly declined "to exercise our pendent appellate jurisdiction over the question of standing." App. 28a.

REASONS FOR GRANTING THE WRIT

Standing, as a jurisdictional question, is always an issue properly before the court, regardless of the stage of proceedings or the posture of the litigation. The court below disregarded this fundamental precept.

This Court should grant review to correct the Eleventh Circuit's departure from clearly established principles governing the "limits on federal judicial power in our system of government." Allen v. Wright, 468 U.S. 737, 750 (1984). In remanding this case to the district court in the face of a strong showing by petitioners that the respondents lacked standing, the Eleventh Circuit ignored what this Court has called "perhaps the most important of [the jurisdictional] doctrines," Allen, 468 U.S. at 751, the application of which in a given case is not a matter of discretion but "an independent obligation," id., to answer the question of whether the litigant is entitled to litigate at all. More than the obvious considerations of judicial economy and the right to be free from groundless claims are at stake here. This Court has said that "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Id. at 750. Indeed, when a court decides an issue without first assuring itself of its subject matter jurisdiction, the court impermissibly declares its willingness to offer an advisory opinion.

Given the paramount importance of the case or controversy requirement within the overall scheme of limited government, the Eleventh Circuit's refusal to discharge its obligation to address the standing issue in this case should not be permitted to stand. The practice in the lower courts, moreover, is divided, indeed badly confused, requiring this Court's definitive intervention.

This Court should grant review, or summary reversal of the decision below.

I. THE DECISION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.

This Court has repeatedly held that the requirement that jurisdiction be established as a threshold matter derives "from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, ----, 118 S. Ct. 1003, 1012-13 (1998), quoting Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884). The federal courts are "under an independent obligation to examine their own jurisdiction." FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). This obligation applies even when the parties concede jurisdiction and make no contention concerning it. Id. at 231, citing Mitchell v. Maurer, 293 U.S. 237, 244 (1934), and Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). As this Court said in Bender:

> . . . every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.

Id. (citations omitted). This obligation attaches at all stages of the litigation. Id. at 547.[2]

Of particular relevance is this Court's decision in Calderon v. Ashmus, 522 U.S. 740, 118 S. Ct. 1694, 1697 (1998). Calderon was an appeal by the State of California from a district court judgment granting a preliminary injunction

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[2]See also, this Court's November 19, 1999 Order in Pending Case, directing the parties to file supplemental briefs on the issue of Article III standing in Vermont Agency of Natural Resources v. U.S., ex rel. Stevens, 1999 WL 1045146 (U.S.), to be reported at 120 S. Ct. 523.

against any attempt by the state to enforce the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). The Ninth Circuit reviewed the matter on an interlocutory basis pursuant to 28 U.S.C. § 1292(a)(1) and, in the course of its review, determined that the plaintiff had demonstrated that an actual case or controversy existed. Ashmus v. Calderon, 123 F.3d 1199, 1207 (9th Cir. 1997).

This Court granted certiorari to review the Eleventh and First Amendment issues raised by the petitioners. Calderon, 522 U.S. ----, 118 S. Ct. 596 (1997). The Court began its review by stating that: "in keeping with our precedents, [we] have decided that we must first address whether this action for a declaratory judgment is the sort of 'Article III' case or controversy to which federal courts are limited." Calderon, 118 S. Ct. at 1697. Having determined that the matter was not a justiciable case within the meaning of Article III, this Court reversed the judgment of the court of appeals and remanded with instructions to dismiss respondent's complaint.

This Court has never deviated from the position that the establishment of jurisdiction is a threshold requirement in every case that comes before a federal court. The Eleventh Circuit in this case, however, relied upon this Court's decision in Swint v. Chambers County Comm'n, 514 U.S. 35 (1995), as support for its position that it could not review standing on an interlocutory appeal under its pendent appellate jurisdiction. App. 14a-16a. In light of this Court's precedents, however, it is clear that the Eleventh Circuit is in error on this point. Swint involved the propriety of pendent appellate jurisdiction over a different party raising nonjurisdictional issues; to read Swint as precluding review of court's jurisdiction when a party raises those objections in a case properly on appeal would create mischief and contradict prior Supreme Court standing cases.

Swint arose out of a series of police raids on a nightclub in Chambers County, Alabama. The club's owners, an

employee, and a patron sued the county commission, the city, and three individual police officers pursuant to 42 U.S.C. § 1983 for alleged civil rights violations. All five defendants moved for summary judgment, the individuals on the grounds of qualified immunity, the city and the county commission on the grounds that their agents who participated in the raids were not policy-making employees whose acts could render those entities liable. Id. at 38-40. The district court denied all of the motions.

Invoking the principle of Mitchell v. Forsyth, 472 U.S. 511, 530 (1985), the individual defendants filed an interlocutory appeal of the denial of their qualified immunity motions. The city and the county commission also appealed, arguing that the denial of their summary judgment motions was also immediately appealable as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949), or, in the alternative, pursuant to the court of appeals' doctrine of "pendent appellate jurisdiction." Swint, 514 U.S. at 40. The Eleventh Circuit did exercise pendent appellate jurisdiction over the county commission's appeal and reversed the district court's order denying summary judgment.

In vacating the Eleventh Circuit's decision in Swint, this Court held that the court of appeals improperly exercised pendent appellate jurisdiction over the motion of the county commission. The Court stressed the limited nature of such jurisdiction and the need for courts to stay within the boundaries set by Congress to control the timing of appellate proceedings. Id. at 45-46. The Court emphasized the distinction between an official's qualified immunity defense and the kind of defense being asserted by the county commission. Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. at 42, quoting Mitchell, 472 U.S. at 526. This Court found that the county commission's defense was a "mere defense to liability" and thus not an appealable collateral order. Swint, 514 U.S. at 43.

In Swint, this Court declined to definitely settle the limits of pendent appellate jurisdiction, but endorsed an approach used by several courts of appeals,[3] namely, that pendent appellate jurisdiction should only be applied to non-appealable issues which are "inextricably intertwined" with appealable issues or where review of the former issues is necessary to ensure meaningful review of the latter. Id. at 51. But nothing in Swint suggests that this Court intended to abandon its long standing doctrine regarding the threshold nature of standing in every federal case. Yet that is how the Eleventh Circuit erroneously applied Swint in the case at bar, stating that: "we may exercise jurisdiction over standing only if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other." App. 14a.

The source of the Eleventh Circuit's error is that court's failure to appreciate that standing is no "mere defense to liability," but, as has been shown, a threshold requirement, a sine qua non of Article III justiciability which must be met in every case at every level of the federal court system. Put another way, the issue of standing most certainly is "inextricably intertwined" with every and any issue which properly comes before a court of appeals, and the determination of the standing issue is an absolutely essential prerequisite to the resolution of all other issues.[4]

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[3]See, e.g., Golino v. New Haven, 950 F.2d 864, 868-69 (2d Cir. 1991); National Union Fire Ins. Co. v. City Savings, F.S.B., 28 F.3d 376, 382 (3d Cir. 1994); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1374 (10th Cir. 1991).

[4]This principle is so basic that the decisions of this Court simply assume that, once interlocutory appellate jurisdiction is established, underlying justiciability issues are open for review. E.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (appeal of civil contempt order used as vehicle to attack plaintiffs' standing); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (appeal of preliminary injunction used

In sum, a reviewing court must address whether Article III jurisdiction exists regardless of the basis for appellate jurisdiction. The Eleventh Circuit's holding that it may ignore the standing issue merits plenary review in this Court, or summary reversal of the decision below.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT AND OTHER FEDERAL COURTS.

The Eleventh Circuit's refusal to determine the question of standing in this case conflicts squarely with a decision of the Fifth Circuit. In U.S. v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999), the Fifth Circuit decided a case brought against a state university under the False Claims Act, 31 U.S.C. § 3729, et. seq. The defendants moved for dismissal claiming immunity under the Eleventh Amendment. The district court denied the motion and the defendants filed an interlocutory appeal pursuant to this Court's holding in Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) ("States and state entities . . . may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

In direct contrast with the Eleventh Circuit's approach in the case below, the Fifth Circuit in Texas Tech University recognized its obligation to first determine whether or not the plaintiff had Article III standing. U.S. v. Texas Tech University, 171 F.3d at 288 n.12. This obligation applied even though none of the parties had challenged plaintiff's standing. Id. ("No one has challenged [plaintiff] Fould's standing in this case. We must, however, consider possible objections to standing sua sponte").

The obligation of the federal courts to resolve

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as vehicle for review of standing).

jurisdictional issues as a threshold matter even on interlocutory appeal was recognized by the Eleventh Circuit itself in a case decided shortly before the case below. In Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212 (11th Cir. 1999),[5] the court considered an interlocutory appeal of a district court's denial of defendants' motions to dismiss a complaint on grounds of lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. The Eleventh Circuit held that it had jurisdiction to decide the issues of subject matter jurisdiction and sovereign immunity, but declined to exercise pendent appellate jurisdiction over the failure to state a claim issue. Id. at 1220-22. With regard to subject matter jurisdiction, the court said: "As a threshold matter, we have a special obligation to satisfy ourselves not only that we have jurisdiction over this appeal, but also that the district court had jurisdiction over the various counts of Tamiami's complaint." Id. at 1221. The court noted: "This obligation applies to every appeal; it is 'inflexible and without exception.'" Id.

The Sixth Circuit case of Children's Healthcare Is A Legal Duty, Inc. v. Deters, 92 F.3d 1412 (6th Cir. 1996), involved a civil rights action challenging the constitutionality of a statute which provided exceptions from prosecution for those who fail to provide adequate medical care for children. The defendants, the attorney general of Ohio and county prosecutors, unsuccessfully sought dismiss for Eleventh Amendment immunity and lack of standing.

The Sixth Circuit reversed on the Eleventh Amendment issue, with Judge Batchelder writing separately to explain why, in her view, the court should have addressed the issue of standing even though it had not been raised by any of the parties on appeal. Children's Healthcare, 92 F.3d at 1412-25:

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[5]The Tamiami case was decided on June 7, 1999. The opinion in the case at bar was rendered on July 15, 1999. App. 1a.

> when an appellant properly appeals another issue, the issue of standing comes before us as well. Constitutional standing is always a threshold inquiry for us to make before asserting jurisdiction over an appeal.

Id. at 1419 (citations omitted).

Contrary to the foregoing are cases decided by the Second and Seventh Circuits. Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (holding that standing is not appealable immediately under collateral order doctrine); City of Detroit v. Grinnell Corp., 495 F.2d 448, 474-75 (2d Cir. 1974) (refusing to review standing question on interlocutory appeal because resolution of issue was merely a "'step[ ] towards final judgment in which [it] will merge'") (citation omitted)).

In view of this lack of uniformity in applying a fundamental rule of law, this Court should intervene to confirm, especially in light of any confusion arising from a misreading of Swint, that Article III standing is always an issue in every proceeding and at every stage including interlocutory appeals.

CONCLUSION

The Eleventh Circuit's departure from settled law in this case is more than a mere misapplication of a properly stated rule of law. It betrays, rather, a fundamental failure to understand the proper role of the federal courts in our constitutional system.

This Court should grant the petition for a writ of certiorari.

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December 20, 1999.

APPENDICES

APPENDIX A

SUMMIT MEDICAL ASSOCIATES, P.C., William Knorr, M.D., et al., on behalf of themselves and their patients seeking abortions, Plaintiffs-Appellees,

v.

Bill PRYOR, in his official capacity as Attorney General and his agents and successors, and Ellen Brooks, in her official capacity as Montgomery District

Attorney, etc., Defendants-Appellants.

No. 98-6129.

United States Court of Appeals,

Eleventh Circuit.

July 15, 1999.

The central issue raised in this interlocutory appeal is whether Alabama's Eleventh Amendment sovereign immunity bars this suit in federal court against the Governor, the Attorney General, and the District Attorney challenging the Alabama Partial-Birth Abortion Ban Act of 1997 ("partial-birth abortion statute") and the Abortion of Viable Unborn Child Act ("post-viability abortion statute"). We hold that Appellees' challenge to the statutes' criminal liability provisions falls squarely within the exception to the Eleventh Amendment embodied in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and, therefore, that the district court did not err in denying Appellants' motion to dismiss this § 1983 action on these grounds. However, with respect to Appellees' challenge to the private civil enforcement provision embodied in the partial-birth abortion statute, we conclude that, because Appellants have no enforcement authority over those specific provisions, the Ex parte Young exception does not apply, and Alabama's sovereign immunity

bars this specific claim. Accordingly, we affirm in part, reverse in part, and remand this case with instructions to the district court to dismiss Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute.

I.

Appellees are three corporations that own abortion clinics, Summit Medical Association, P.C., Beacon Women's Center, and New Woman, All Women Health Care, and one physician, William H. Knorr, M.D. They initiated this action on July 24, 1997, in the United States District Court for the Middle District of Alabama against Fob James, Jr., then Governor of Alabama, Bill Pryor, Attorney General of Alabama, and Ellen Brooks, Montgomery District Attorney, alleging that the Alabama Partial-Birth Abortion Ban Act of 1997, Ala.Code §§ 26- 23-1 to -6 (Supp.1998), and the Abortion of Viable Unborn Child Act, Ala.Code §§ 26-22-1 to -5 (Supp.1998), violate the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983 (1994). They sought injunctive and declaratory relief.[1]

In 1997, the Alabama state legislature enacted these statutes to impose criminal and civil penalties on the performance of certain types of abortion procedures. The partial-birth abortion statute prohibits any physician from "knowingly" performing a "partial-birth abortion,"[2] Ala.Code

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[1]The effective dates of these statutes were August 1, 1997 and August 12, 1997, respectively. Therefore, at the time of the filing of this action, neither statute had taken effect.

[2]In full, the partial-birth abortion statute provides:

§ 26-23-1. Title.

This chapter may be cited as the "Alabama Partial-Birth Abortion Ban Act of 1997."

§ 26-23-2. Definitions.

As used in this chapter, the following terms shall have the following meanings:

(1) FATHER. The biological father of the human fetus.

(2) MOTHER. The female who is pregnant with a live human fetus which may be subject to a partial-birth abortion under this chapter.

(3) PARTIAL-BIRTH ABORTION. An abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(4) PHYSICIAN. A doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state or any other individual legally authorized by the state to perform abortions. This definition shall also include any individual who is not a physician or is not otherwise legally authorized by the state to perform abortions, but who nevertheless performs a partial-birth abortion.

§ 26-23-3. Physician; prohibited action.

Any physician who knowingly performs a partial-birth abortion within this state and thereby kills a human fetus shall be guilty of a Class C felony and upon conviction thereof shall be punished as prescribed by law.

§ 26-23-4. Exception; life of the mother.

Section 26-23-3 shall not apply to a partial-birth abortion that is necessary to save the life of a mother.

§ 26-23-5. Relief; father and maternal grandparents.

The father, if married to the mother at the time she receives a partial- birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall be limited to monetary compensation for all injuries, psychological and physical, occasioned by a violation under this chapter and monetary punitive compensation as allowed by law.

§ 26-23-6. Woman; prosecution.

A woman upon whom a partial-birth abortion is performed may not be prosecuted under this chapter for a conspiracy to violate

§ 26-23-3, defined as "[a]n abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," id. § 26-23-2(3). The performance of such an abortion constitutes a Class C felony, punishable by a fine of not more than $5000 and imprisonment for up to ten years, and triggers the possibility of license revocation under Alabama law. See id. § 26-23-3; see also Ala.Code §§ 13A-5-2, -6(a)(3), -11(a)(3) (1994); Ala.Code § 34-24- 360(4) (1997). Under the statute's private civil enforcement provision, the performing physician also may be liable in a civil suit to the "father" of the fetus, if he is married to the woman who underwent the abortion, or to the "maternal grandparents" of the fetus, if the woman is a minor at the time of the procedure. Ala.Code § 26-23-5. However, where the abortion "is necessary to save the life of the mother" the statute bars criminal and civil liability. Id. § 26-23-4.

On August 1, 1997, the effective date of the partial-birth abortion statute, the Alabama Attorney General sent letters to four Alabama district attorneys instructing them on his interpretation of the new statute.[3] The letters stated that for the purpose of prosecutions brought under the act, "a physician partially delivers a living fetus before killing the fetus [as proscribed by the act] when the physician deliberately and intentionally delivers into the vagina a viable fetus, or a substantial portion of the viable fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."

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this chapter or for any other offense which is unlawful under this chapter.

Ala.Code. §§ 26-23-1 to -6.

[3]The Attorney General stated that these instructions were given pursuant to Ala.Code § 36-15-14 (1991), which provides in relevant part: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of any criminal case in any of the courts of this state."

The post-viability abortion statute, on the other hand, prohibits any person from "intentionally, knowingly, or recklessly" performing or inducing any type of abortion "when the unborn child is viable."[4] Ala.Code § 26-22-3(a). "Viable

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[4]In its entirety, the post-viability abortion statute provides:

§ 26-22-1. Legislative findings and intent.

(a) The public policy of the State of Alabama is to protect life, born and unborn. This is particularly true concerning unborn life that is capable of living outside the womb. The Legislature of the State of Alabama finds there are abortions being done in Alabama after the time of viability and in violation of its public policy.

(b) The Legislature specifically finds the following:

(1) Medical evidence shows there is a survival rate of babies born between ages 23 weeks to 29 weeks gestational age of 64 percent to 94 percent.

(2) In Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the United States Supreme Court determined that viability may occur as early as 23 to 24 weeks gestational age. Also, the United States Supreme Court determined that requiring fetal viability testing at 20 weeks gestational age is constitutional, because there is up to a four week margin of error in determining gestational age.

(3) In the latest year of Alabama statistical reporting, 1994, there were reported to be 182 abortions performed at 20 or more weeks gestational age. There were also 70 abortions performed where no gestational age was stated.

(c) Subject to life and health exceptions to the mother, it is the intent of the Legislature to ban abortions of any unborn child that is capable of living outside the womb. To permit otherwise is a wanton disregard of human life.

§ 26-22-2. Definitions.

The following words shall have the following meanings:

(1) ABORTION. The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood,

cause the death of the unborn child.

(2) FERTILIZATION. The fusion of a human spermatozoon with a human ovum.

(3) GESTATIONAL AGE. The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

(4) HOSPITAL. An institution licensed pursuant to the provisions of the law of this state.

(5) LIVE BIRTH. When used with regard to a human being, means that the human being was completely expelled or extracted from his or her mother and after such separation, breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles, or any brain-wave activity.

(6) MEDICAL EMERGENCY. The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(7) PREGNANT. The female reproductive condition of having a developing fetus in the body and commences with fertilization.

(8) UNBORN CHILD AND FETUS. An individual organism of the species homo sapiens from fertilization until live birth.

(9) VIABLE AND VIABILITY. The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§ 26-22-3. Prohibition–Exceptions--Regulations--Penalties.

(a) Prohibition. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.

(b) Exceptions.

(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in the substantial and irreversible impairment of a major bodily function.

(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable.

(c) Abortion regulated. Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:

(1) The physician performing the abortion certifies in writing that, based upon his or her medical examination of the pregnant woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or serious risk of substantial and irreversible impairment of a major bodily function.

(2) The physician's judgment with respect to the necessity for the abortion has been concurred in by one other licensed physician who certifies in writing that, based upon his or her separate personal medical examination of the pregnant wom

an and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman.

(3) The abortion is performed in a hospital.

(4) The physician terminates the pregnancy in a manner

which provides the best opportunity for the unborn child to survive, unless the physician determines, in his or her good faith medical judgment, that termination of the pregnancy in that manner poses a significantly greater risk either of the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman than would other available methods.

(5) The physician performing the abortion arranges for the attendance, in the same room in which the abortion is to be completed, of a second physician who shall take control of the child immediately after complete extraction from the mother and shall provide immediate medical care for the child, taking all reasonable steps necessary to preserve the child's life and health.

(d) Penalty. Any person who violates subsection (a) commits a Class A felony. Any person who violates subsection (c) commits a Class C felony.

§ 26-22-4. Viability testing.

Except in the case of a medical emergency, prior to performing an abortion upon a woman subsequent to her first 19 weeks of pregnancy, the physician shall determine whether, in his or her good faith medical judgment, the child is viable. When the physician has determined that a child is viable, he or she shall report the basis for his or her determination that the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. When the physician has determined that a child is not viable after the first 19 weeks of pregnancy, he or she shall report the basis for such determination.

§ 26-22-5. Construction.

Nothing in this chapter shall be construed to recognize a right to abortion or to make legal an abortion that is otherwise unlawful.

Ala.Code §§ 26-22-1 to -5.

The statute also contained the following severability provision:

If any provision, word, phrase, or clause of this act, or the application thereof, to any person, entity, or circumstance shall be

and viability" are defined in the statute as follows:

> The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

Id. § 26-22-2(9) (emphasis added). After the nineteenth week of pregnancy, the statute requires all physicians performing abortions to make a good-faith medical judgment as to whether the fetus is viable. See id. §§ 26-22- 2(9), -4.

Under the post-viability abortion statute, a person who intentionally, knowingly, or recklessly performs or induces a post-viability abortion has committed a Class A felony, punishable by imprisonment from ten to ninety-nine years and fines up to $20,000. See id. § 26-22-3(a), (d); see also Ala.Code §§ 13A-5-2, -6(a)(1),--11(a)(1). A physician may perform a post-viability abortion if he or she "reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman." Ala.Code § 26-22-3(b)(1). Under these circumstances, a physician must satisfy five additional procedural requirements, including written certification of the physician's judgment, written concurrence of another licensed physician, and performance of all reasonable steps necessary to preserve the life and health of the unborn child. See id. § 26-22-3(c)(1) to (5). Failure to comply with these requirements constitutes a Class C felony, punishable by imprisonment from one year and one day to ten years and fines up to

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held invalid, such invalidity shall not affect the remaining provisions, words, phrases, clauses, or application of this act, which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end, the provisions, words, phrases, and clauses of this act are declared to be severable.

Act of May 14, 1997, § 6, 1997 Ala. Acts 97-442.

$5000. See id. § 26-22-3(d). These requirements are waived, however, where the physician, in his or her reasonable medical judgment, determines that the nature of the medical emergency prevents compliance. See id. § 26-22-3(c).

Appellees allege that these statutes are unconstitutionally vague and can be construed to prohibit abortions performed in the first trimester of pregnancy, thus imposing an undue burden on the right of patients to seek abortions free from government interference.[5] Moreover, Appellees contend that the post-viability abortion statute imposes a further undue burden because it does not provide adequate safeguards for protecting a patient's health. Appellees also challenge the partial-birth abortion statute's private civil enforcement provision on the ground that it unduly burdens patients' rights to obtain abortions without government interference.

On September 4, 1997, Attorney General Pryor and District Attorney Brooks ("Appellants") filed a motion to dismiss alleging lack of standing, Eleventh Amendment immunity, and failure to state a claim on the merits. Governor James also moved to dismiss for lack of subject matter jurisdiction. On November 24, 1997, the district court held a hearing on these motions.

Thereafter, on January 26, 1998, the district court issued an order and a lengthy memorandum opinion denying

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[5]All Appellees perform abortions through the thirteenth week from the woman's last menstrual period ("LMP"). They allege that these abortions may fall within the proscription of the partial-birth abortion statute, and that they intend to continue to perform such abortions despite the existence of the statute. Appellees Summit Medical and Dr. Knorr perform abortions through twenty-four and a half weeks LMP. Similarly, they allege that these abortions may fall within the proscription of the post-viability abortion statute, and that they intend to continue performing such abortions despite the existence of the statute. As a consequence of these intentions, all Appellees allege that they fear prosecution under either or both statutes.

the Governor's motion and granting in part, and denying in part, Appellants' motion.[6] See Summit Med. Assocs. v. James, 984 F.Supp. 1404 (M.D.Ala.1998) [hereinafter Summit I]. Specifically, in granting Appellants' motion, the district court dismissed all claims for injunctive relief and those claims challenging the viability testing provisions of the post-viability abortion statute. The order left standing, however, Appellees' claims for declaratory relief against the other portions of both statutes. The district court also specifically rejected Appellants' Eleventh Amendment and standing defenses, reasoning that since the Appellants may be engaged in an ongoing violation of federal law, the Ex parte Young exception to Eleventh Amendment immunity applied.[7] Moreover, the district court found that Appellees had alleged a sufficiently credible threat of prosecution to establish standing to bring suit in federal court.

Appellants gave timely notice of appeal on February 13, 1998. They also filed a motion to stay proceedings in the district court pending a ruling on appeal. On March 19, 1998, the district court granted the motion to stay. See Summit Med. Assocs. v. James, 998 F.Supp. 1339 (M.D.Ala.1998) [hereinafter Summit II]. This interlocutory appeal followed.

II.

We review issues of federal subject matter jurisdiction de novo. See University of S. Ala. v. American Tobacco Co., 168 F.3d 405, 408 (11th Cir.1999). Similarly, a district court's denial of a motion to dismiss on Eleventh Amendment

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[6]As part of its ruling, the district court also certified questions to the Supreme Court of Alabama, as allowed under Rule 18 of the Alabama Rules of Appellate Procedure. On February 13, 1998, however, the Alabama Supreme Court declined to answer the certified questions.

[7]The district court's reasoning is expressed both in its January 26 opinion, see Summit I, 984 F.Supp. 1404, and in its decision to stay proceedings pending resolution of this appeal, see Summit Med. Assocs. v. James, 998 F.Supp. 1339 (M.D.Ala.1998).

grounds is a question of law subject to de novo review. See Seminole Tribe v. Florida, 11 F.3d 1016, 1021 (11th Cir.1994), aff'd, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

A.

Jurisdiction

As an initial matter, we must address our jurisdiction to review Appellants' claims. Appellants raise two issues on interlocutory appeal: (1) whether the district court erred in concluding that Appellants were not entitled to Eleventh Amendment immunity; and (2) whether the district court erred in holding that Appellees have standing to commence this cause of action. We unquestionably have jurisdiction under the collateral order doctrine to consider the question of sovereign immunity. However, we decline to exercise discretionary pendent appellate jurisdiction to review the district court's determination of standing.

A district court's denial of a motion to dismiss on Eleventh Amendment immunity grounds is appealable immediately. See In re Burke, 146 F.3d 1313, 1316 (11th Cir.1998) (citing Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)), petition for cert. filed, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-906); Schopler v. Bliss, 903 F.2d 1373, 1377 (11th Cir.1990). This right to an interlocutory appeal stems from the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), as an exception to the finality requirement of 28 U.S.C. § 1291 (1994). Under Cohen, an order is appealable if it (1) "conclusively determine[s] [a] disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) "[is] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). In Puerto Rico Aqueduct, the Supreme Court squarely held that an order denying a defendant Eleventh Amendment immunity is a collateral order subject to immediate interlocutory appeal. See 506 U.S. at 147, 113 S.Ct. 684. Therefore, we have jurisdiction under 28 U.S.C. § 1291 to

resolve Appellants' sovereign immunity claim now.

In contrast to the question of Eleventh Amendment immunity, however, we have held that a district court's denial of a motion to dismiss on justiciability grounds is not immediately appealable under the collateral order doctrine. See Crymes v. DeKalb County, 923 F.2d 1482, 1484-85 (11th Cir.1991) (ripeness); see also Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1418 (6th Cir.1996) (Batchelder, J., concurring) (citing Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496-97 n. 2 (7th Cir.1993) (holding that standing is not appealable immediately under collateral order doctrine); Shanks v. City of Dallas, 752 F.2d 1092, 1099 n. 9 (5th Cir.1985) (rejecting interlocutory appeal of standing on ground that issue was "enmeshed" with merits of cause of action); City of Detroit v. Grinnell Corp., 495 F.2d 448, 474-75 (2d Cir.1974) (refusing to review standing question on interlocutory appeal because resolution of issue was merely a " 'step [ ] towards final judgment in which [it] will merge' ") (citation omitted)). Although a district court's standing determination conclusively resolves a disputed question and settles an important issue separate from the merits of the case, courts have recognized that the issue of standing is not effectively unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order doctrine. See, e.g., Triad, 10 F.3d at 496-97 n. 2. In light of this unambiguous precedent, we conclude that the question of standing does not fit within the collateral order doctrine, and, therefore, that Appellants may not as of right take an immediate interlocutory appeal on this issue.[8]

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[8]At least one circuit judge has elected to consider standing as part of an otherwise proper interlocutory appeal of Eleventh Amendment immunity. In Deters, Judge Batchelder, writing separately, concluded sua sponte that the issue of standing necessarily comes before an appellate court when another issue is properly appealed. See 92 F.3d at 1419 (Batchelder, J., concurring). In reaching this determination, the Judge emphasized that "[c]onstitutional standing is always a threshold inquiry" on appeal because federal courts have "an independent obligation to examine [their] own jurisdiction." Id. Judge Batchelder elected to reach the

Notwithstanding the unavailability of the collateral order doctrine to the standing issue, however, we may, within our discretion, exercise jurisdiction over otherwise nonappealable orders under the pendent appellate jurisdiction doctrine. See Crymes, 923 F.2d at 1485. Under this doctrine, a federal appellate court may address nonappealable orders if they are "inextricably intertwined" with an appealable decision or if "review of the former decision [is] necessary to ensure meaningful review of the latter." Swint v. Chambers County Comm'n, 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995); see also Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir.1997) (reviewing nonappealable order compelling production with appealable sanctions order); United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n. 10 (11th Cir.1997) (reviewing nonappealable order striking portion of indictment with appealable order excluding evidence from trial). In Swint, the Supreme Court considered the propriety of exercising pendent appellate jurisdiction over an otherwise nonappealable issue that concerned parties different from those involved in the appealable qualified immunity question. See 514 U.S. at 41, 115 S.Ct. 1203. Although the Court declined to settle definitively the application of pendent appellate jurisdiction to related issues, it held that this use of pendent appellate jurisdiction was improper because the issues were neither intertwined nor essential to each other. See id. at 50-51, 115 S.Ct. 1203. Under this doctrine, therefore, we may exercise jurisdiction over standing only if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other.

This question is governed by our decision in Moniz v. City of Fort Lauderdale, 145 F.3d 1278 (11th Cir.1998). In

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merits of standing on appeal, therefore, not as an independently appealable collateral order, but as a part of a federal court's obligation to satisfy itself that a matter is justiciable. However, in light of our case precedent, see Moniz v. City of Ft. Lauderdale, 145 F.3d 1278 (11th Cir.1998), we do not have occasion to consider the merits of this argument..

Moniz, we considered on interlocutory appeal whether to review standing under our pendent appellate jurisdiction where Appellants had also appealed, under the collateral order doctrine, the district court's rejection of their qualified immunity defense. See id. at 1281 n. 3. Upon consideration of whether the issues were "inextricably intertwined" or whether a determination of one was "necessary to ensure meaningful review" of the other, we concluded the following:

> Because we may resolve the qualified immunity issue in this case without reaching the merits of appellants' challenge to Moniz's standing, ... we conclude that the latter issue does not come under either of these categories and thus does not fall within our pendent appellate jurisdiction under Swint.

Id. As in Moniz, we may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing.[9] These issues are neither "inextricably intertwined" nor "necessary to ensure meaningful review" of one another. As the district court observed:

> [T]he attorney general defendants' arguments regarding the plaintiffs' alleged failure to show that they face an imminent and credible threat of prosecution [with respect to standing] ... are completely irrelevant to the eleventh-amendment-immunity issue that they raise on appeal.... By contrast, the attorney general defendants' contentions regarding the lack of an imminent prosecution are, of course, directly relevant to the distinct question [ ] of whether the plaintiffs enjoy standing to sue in federal court ... [and] are not implicated by the attorney general defendants' appeal to the Eleventh Circuit.

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[9]Qualified immunity, like sovereign immunity, is an immunity from litigation and not just from liability. See Mitchell v. Forsyth, 472 U.S. 511, 526-27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, we believe that our reasoning in Moniz applies with equal force to an interlocutory appeal of Eleventh Amendment immunity.

Summit II, 998 F.Supp. at 1350. Therefore, because we conclude that Appellants have failed to satisfy the test set forth in Swint, and because of our unambiguous precedent in Moniz, we decline to exercise discretionary pendent appellate jurisdiction to address here the question of Appellees' standing to commence this action. We turn, therefore, to the merits of sovereign immunity.

B.

Eleventh Amendment

The Eleventh Amendment to the United States Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment not only bars suits against a state by citizens of another state, but also applies equally to suits against a state initiated by that state's own citizens. See Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Hans v. Louisiana, 134 U.S. 1, 13-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Moreover, the Eleventh Amendment prohibits suits against state officials where the state is, in fact, the real party in interest. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). For example, if a lawsuit seeks to order the state officer to pay funds directly from the state treasury for the wrongful acts of the state, then the state is the real party in interest and the Eleventh Amendment bars the suit.

Under the doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, there is a long and well-recognized exception to this rule for suits against state officers seeking prospective equitable relief to end continuing violations of federal law. See Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) ("We do not ... question the continuing validity of the Ex parte Young doctrine."). Because Appellees, citizens of Alabama, have sued Alabama state officers to obtain declaratory relief, the parties agree that this lawsuit must be dismissed unless

it falls within Ex parte Young 's exception to the Eleventh Amendment.

The Eleventh Amendment generally does not bar the exercise of the judicial power of the United States where a plaintiff seeks to compel a state officer to comply with federal law. See Ex parte Young, 209 U.S. at 158-59, 28 S.Ct. 441. Because the enforcement of "an unconstitutional statute is void, and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States,' " the Supreme Court has held that the officer is not entitled to protection by the state's sovereign immunity. Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (quoting Ex parte Young, 209 U.S. at 160, 28 S.Ct. 441); see also Coeur d'Alene, 521 U.S. at 288, 117 S.Ct. 2028 (O'Connor, J., concurring) ("The Young doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity."). This doctrine has, therefore, been described as a legal "fiction" because it creates an imaginary distinction between the state and its officers, deeming the officers to act without the state's authority, and, hence, without immunity protection, when they enforce state laws in derogation of the Constitution. See Pennhurst, 465 U.S. at 114 n. 25, 104 S.Ct. 900.

Thus, the availability of this doctrine turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief. As the Supreme Court has explained:

Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of

that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (quoting Green, 474 U.S. at 68, 106 S.Ct. 423). Therefore, the Eleventh Amendment bars suits against state officials in federal court seeking retrospective or compensatory relief, but does not generally prohibit suits seeking only prospective injunctive or declaratory relief. See Green, 474 U.S. at 68, 106 S.Ct. 423. If the prospective relief sought is the functional equivalent of money damages, however, i.e., "[i]t is measured in terms of a monetary loss resulting from a past breach of a legal duty," Ex parte Young does not apply. Edelman, 415 U.S. at 669, 94 S.Ct. 1347.

Because of the important interests of federalism and state sovereignty implicated by Ex parte Young, however, the doctrine is not without limitations--indeed, two are relevant to this appeal. First, the Ex parte Young doctrine applies only to ongoing and continuous violations of federal law. See Papasan, 478 U.S. at 277-78, 106 S.Ct. 2932; Green, 474 U.S. at 68, 106 S.Ct. 423. In other words, a plaintiff may not use the doctrine to adjudicate the legality of past conduct. See Papasan, 478 U.S. at 277-78, 106 S.Ct. 2932. This requirement protects states by setting "a minimum threshold for abrogating a state's constitutional immunity." Booth v. Maryland, 112 F.3d 139, 142 (4th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998). Second, in Idaho v. Coeur d'Alene Tribe, the Supreme Court recently said that the Ex parte Young doctrine does not apply where the equitable relief sought "implicates special sovereignty interests." 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Thus, if prospective relief would invade a state's sovereignty as much as an award of money damages would, the action will be barred by the Eleventh Amendment.

Against this backdrop, we turn to the application of Ex parte Young to this lawsuit initiated by abortion providers against the Governor of Alabama, the Attorney General, and the District Attorney challenging the criminal liability provisions of Alabama's post-viability and partial-birth

abortion statutes. Appellants raise two basic arguments in support of their immunity defense. First, they contend that the district court erred in concluding that Appellants were engaged in an ongoing and continuous violation of federal law. According to Appellants, Appellees have not challenged any action that an Alabama officer has undertaken or has threatened to undertake; rather, Appellees have challenged only the responsibilities such officers have in their status as state officials. Appellants argue that so bare a possibility of enforcement does not present a sufficient danger to federal rights to justify a federal court's invasion of Alabama's sovereign immunity. Second, Appellants argue that Coeur d'Alene 's limitation on Ex parte Young applies to this case because of the state's significant interest in regulating late-term abortions of viable fetuses. Because we believe that this case falls squarely within the Ex parte Young exception to the Eleventh Amendment, we find Appellants' arguments unavailing.

As we discussed earlier, Ex parte Young requires the allegation of an ongoing and continuous violation of federal law. See Coeur d'Alene, 521 U.S. at 281, 117 S.Ct. 2028 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction."). This requirement does not mean that the enforcement of the allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit. Rather, we agree with the district court that the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature, i.e., designed to prevent injury that will occur in the future, and cases where relief is retrospective. As the Supreme Court explained in Papasan, "Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." 478 U.S. at 277-78, 106 S.Ct. 2932. Similarly, in Green v. Mansour, the Supreme Court recognized that where there "was no threat of state officials violating the repealed law in the future," the Eleventh Amendment prohibited the issuance of a declaratory judgment to adjudicate past violations of federal law. See 474 U.S. at 73, 106 S.Ct. 423. Thus, where there is a threat of

future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied.

Appellants contend, however, that under Ex parte Young, a state officer's enforcement of an allegedly unconstitutional state law must be imminent, not merely threatened. We decline to adopt so limited a view of the Ex parte Young doctrine. Indeed, Ex parte Young recognized the very real reason a plaintiff may need a vehicle to challenge the constitutionality of a state law before enforcement is imminent. In Ex parte Young, plaintiffs brought suit in federal court against, inter alia, the Minnesota Attorney General to enjoin his enforcement of an allegedly unconstitutional state statute in Minnesota state court. See 209 U.S. at 129-32, 28 S.Ct. 441. The Supreme Court unambiguously recognized the efficacy of pre-enforcement challenges:

It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the [plaintiff] from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the [plaintiff] from seeking judicial construction of laws which deeply affect [his] rights.

Id. at 147, 28 S.Ct. 441. The Ex parte Young doctrine does not demand that a plaintiff first risk the sanctions of imminent prosecution or enforcement in order to test the validity of a state law.

Moreover, Appellants' imminence requirement would essentially render Ex parte Young a nullity, leaving plaintiffs with only the most narrow window in which to initiate suit in federal court. Under the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), once a state prosecution is pending, a criminal defendant is barred from challenging the constitutionality of a state law in federal court except under very limited circumstances. In Younger, the Supreme Court held that a federal court could enjoin a pending state criminal proceeding only if "the danger of irreparable loss is both great and immediate," and only if

"the threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." Id. at 45-46, 91 S.Ct. 746 (internal citation and quotation marks omitted). But so long as the state criminal proceeding is " 'brought lawfully and in good faith,' " a state defendant is not free to sue in federal court to enjoin a state court prosecution. Id. at 49, 91 S.Ct. 746 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164, 63 S.Ct. 877, 87 L.Ed. 1324 (1943)). Thus, the initiation of a state criminal proceeding generally cuts short the availability of Ex parte Young.

When a state criminal proceeding is not pending, however, federal equitable relief is permissible. In Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), a plaintiff who had been threatened with arrest for trespass if he continued to distribute handbills at a shopping center sought a declaratory judgment that the state trespass statute was unconstitutional. The Supreme Court held that Younger did not bar the federal declaratory action because, since no state prosecution was pending, there was no danger of duplicating or disrupting the state court proceeding. See id. at 462, 475, 94 S.Ct. 1209. The Court also noted that "a refusal on the part of the federal courts to intervene ... may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity." Id. at 462, 94 S.Ct. 1209. Appellants' imminence requirement would force a plaintiff into precisely this predicament. In order for prosecution to be sufficiently imminent, a potential plaintiff would have to risk state criminal prosecution. If the plaintiff does not take that risk, however, by declining to engage in any arguably proscribed conduct, he must forego an adjudication of his claim in federal court.

We are unable to understand how, as a practical matter, a potential plaintiff will ever be able to predict when prosecution is indeed "imminent." Certainly, a prosecutor has no obligation to inform a target that she is planning to bring criminal charges, or that prosecution is imminent. These decisions are committed entirely to the sound discretion of the prosecutor. Cf. United States v. Cespedes, 151 F.3d 1329,

1332 (11th Cir.1998) (" '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.' " (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978))), cert. denied, --- U.S. ----, 119 S.Ct. 836, 142 L.Ed.2d 692 (1999); United States v. Thomas, 62 F.3d 1332, 1339 (11th Cir.1995) ("A prosecutor has no obligation to bring charges as soon as she has enough evidence to indict; instead, she may wait until she is satisfied that she has enough evidence to establish guilt beyond a reasonable doubt."). In short, if a plaintiff were barred from airing his grievance in federal court while an investigation was pending before a grand jury or prosecutor because he did not know and could not prove that his prosecution was imminent, and if a plaintiff were similarly barred while the prosecution was pending in state court--as he plainly would be under Younger v. Harris--then the avenue for seeking prospective relief in a federal forum would be slender indeed. We can find no such imminency requirement in Supreme Court case precedent, and we decline to graft one onto the long-recognized doctrine of Ex parte Young.

Here, Appellees unquestionably seek prospective relief--a declaratory judgment that the partial-birth and post-viability abortion statutes are unconstitutional. Although Appellants have not yet initiated prosecution, nor have they specifically threatened Appellees with prosecution, Appellants do intend to prosecute violators of both statutes, at least in cases where the fetus is viable.[10] Moreover, as Appellants concede, the Attorney General could withdraw the enforcement directive and prosecute partial-birth abortions pre-viability. Given the severity of the potential penalties--up to ten years for the partial-birth abortion statute and up to ninety-nine years for the post-viability abortion statute-- Appellees would not have to be very risk averse to avoid any arguably proscribed conduct that may come within the reach of these statutes. In short, Appellees have sufficiently

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[10]See Letter from Attorney General (August 1, 1997).

alleged an ongoing and continuous violation of federal law.[11]

Turning to Appellants' second argument, we are not persuaded that Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), has any bearing on this case. In Coeur d'Alene, an Indian tribe sought both declaratory and injunctive relief to resolve the tribe's right to quiet enjoyment over certain state lands. See id. at 264-65, 117 S.Ct. 2028. The Supreme Court found that the Eleventh Amendment barred the action notwithstanding the fact that the tribe sought only prospective equitable relief. See id. at 287-88, 117 S.Ct. 2028. The Court reasoned that "if the Tribe were to prevail, Idaho's sovereignty interests in its lands and waters would be affected in a degree fully as intrusive as almost any conceivably retroactive levy upon funds in its

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[11]We also find Appellants' remaining arguments unpersuasive. First, Appellants contend that, in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Supreme Court held that the Ex parte Young doctrine requires some imminence of prosecution. See id. at 381-83, 112 S.Ct. 2031. However, in Morales, the Court cited to Ex parte Young only in the context of determining whether there was sufficiently imminent and irreparable injury to support an award of injunctive relief. See id. at 381, 112 S.Ct. 2031. The Court never discussed the Eleventh Amendment or the Ex parte Young exception because it was not at issue in the case. Accordingly, Morales does not control this case. Second, Appellants argue that "Young does not apply when a defendant state official has neither enforced not threatened to enforce the allegedly unconstitutional state statute." Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1415 (6th Cir.1996). In Deters, however, the defendant in question had no authority to enforce the statutes under Ohio law. See id. at 1417. Moreover, the plaintiffs did not even seek to enjoin the statutes' enforcement. Rather, the plaintiffs asked the court to permit broader enforcement of the statutes by striking out certain provisions. See id. at 1416. Given the absence of any connection between the state officer defendant and any enforcement of the statutes, as well as the odd nature of the relief sought, the court could not justify applying Ex parte Young. See id. at 1414. Therefore, we similarly conclude that Deters does not apply to this matter.

Treasury." Id. at 287, 117 S.Ct. 2028. Thus, because the relief sought implicated the state's "special sovereignty interests" and was the "functional equivalent" of relief that would otherwise be barred by the Eleventh Amendment, the Court concluded that the Ex parte Young doctrine did not apply. Id. at 281, 117 S.Ct. 2028.

Unlike the quiet title action in Coeur d'Alene, the relief sought here does not implicate the state's real property interests that the Supreme Court found to be protected by the Eleventh Amendment. Undoubtedly Alabama has a significant interest in regulating abortions of viable fetuses. However, the remedy of a declaratory judgment is not the "functional equivalent" of a form of relief barred by the Eleventh Amendment. A declaratory judgment will establish only the constitutionality of these statutes; it will not prevent the state from regulating late-term abortions in other ways. In contrast, the remedy in Coeur d'Alene would have resolved, for all time, Idaho's property interests in the disputed submerged lands. As the Court emphasized:

> The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282, 117 S.Ct. 2028. Moreover, a successful challenge to the statutes at issue today will not in any way render this inherently prospective relief retrospective by implicating Alabama's treasury. See Edelman, 415 U.S. at 666-69, 94 S.Ct. 1347. Accordingly, the instant case is different from Coeur d'Alene.

In short, the Eleventh Amendment does not bar Appellees' challenge to the criminal liability provisions of the partial-birth and post-viability abortion statutes. We stress, however, that today we decide only the Eleventh Amendment issue raised in this interlocutory appeal. We have no occasion to reach, and do not examine in any way, whether the partial-birth and post-viability abortion statutes

are constitutional under the Fourteenth Amendment. We hold only that the Eleventh Amendment does not bar this suit with respect to the criminal liability provisions.

We reach a different result, however, as to Appellants' claim that the Eleventh Amendment bars Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute.[12] Specifically, Appellants also argue, and we agree, that the doctrine of Ex parte Young cannot operate as an exception to Alabama's sovereign immunity where no defendant has any connection to the enforcement of the challenged law at issue.

The Eleventh Amendment bars Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute. In Ex parte Young, the Supreme Court observed:

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

... The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the

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[12]Appellants did not raise this argument below. Rather, they merely argued, and the district court rejected, that there was no state action with respect to the private civil enforcement provision. Although we generally decline to address arguments raised for the first time on appeal, it is within our discretion to do so. See Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir.1982). Because this issue "involves a pure question of law" and our "refusal to consider it would result in a miscarriage of justice," we will reach the merits of whether Appellees may challenge the private civil enforcement provision of the partial-birth abortion statute under the doctrine of Ex parte Young. Id. (citing Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir.1976)).

important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157, 28 S.Ct. 441. Therefore, unless the state officer has some responsibility to enforce the statute or provision at issue, the "fiction" of Ex parte Young cannot operate. Only if a state officer has the authority to enforce an unconstitutional act in the name of the state can the Supremacy Clause be invoked to strip the officer of his official or representative character and subject him to the individual consequences of his conduct. See id. at 159-60, 28 S.Ct. 441.

In Fitts v. McGhee, 172 U.S. 516, 19 S.Ct. 269, 43 L.Ed. 535 (1899), the Court expounded on the nature of this "connection" between the state officer and the challenged statute:

There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the

Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Id. at 529-30, 19 S.Ct. 269. Accordingly, federal courts have refused to apply Ex parte Young where the officer who is charged has no authority to enforce the challenged statute. See, e.g., Deters, 92 F.3d at 1416-17 (refusing to apply Ex parte Young to action against Attorney General where only local prosecutors had authority to enforce challenged statute). Compare Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."), with Luckey v. Harris, 860 F.2d 1012, 1015-16 (11th Cir.1988) (holding that Governor has sufficient contacts with alleged unlawful action because he is responsible for law enforcement, has residual power to commence criminal prosecutions, and has final authority to direct the Attorney General to prosecute on behalf of the state).

As Appellants correctly point out, only a husband or a maternal grandparent, see Ala.Code § 26-23-5, may enforce the civil provision of the partial-birth abortion statute. Since neither the Governor, the Attorney General, nor the District Attorney--the only defendants in this case--have any relationship to the enforcement of this provision, we conclude that the Ex parte Young doctrine does not apply. Therefore, we hold that Appellees' suit against the Governor, the Attorney General, and the District Attorney with respect to the private civil enforcement provision of the partial-birth abortion statute is barred by the Eleventh Amendment.

III.

In sum, we affirm the district court's order denying Appellants' motion to dismiss with respect to the statutes' criminal liability provisions because Appellees challenge to these provisions plainly falls within the exception to the Eleventh Amendment established in Ex parte Young. However, the Eleventh Amendment does bar Appellees' challenge to the private civil enforcement provision of the

partial-birth abortion statute because Appellants have no authority to enforce that provision as required by Ex parte Young and its progeny. Finally, we decline to exercise our pendent appellate jurisdiction over the question of standing. That issue may be litigated on appeal from any final judgment.

Accordingly, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED with instructions to the district court to dismiss Appellees' challenge to the private civil enforcement provision of the partial- birth abortion statute.

APPENDIX B

SUMMIT MEDICAL ASSOCIATES, P.C., et al., Plaintiffs,

v.

Fob JAMES, Jr., et al., Defendants.

Civil Action No. 97-T-1149-N.

United States District Court,

M.D. Alabama,

Northern Division.

Jan. 26, 1998.

MEMORANDUM OPINION

MYRON H. THOMPSON, Chief Judge.

The plaintiffs, Alabama-based providers of abortion services, challenge the constitutionality of two recently-enacted Alabama abortion statutes under the fourteenth amendment to the United States Constitution, as enforced through 42 U.S.C.A. § 1983 (West 1994). The first challenged statute is the Alabama Partial-Birth Abortion Ban Act of 1997, 1975 Ala.Code § 26-23-1 to 26-23-6 (Law.Co-op.Supp.1997), which took effect on August 1, 1997, and proscribes what it terms "partial-birth abortions," except under certain medical emergency circumstances. The second statute, the Alabama Abortion of Viable Unborn Child Act, 1975 Ala.Code §§ 26-22-1 to 26-22-4 (Law.Co- op.Supp.1997), took effect on August 12, 1997, and proscribes abortions performed after the fetus has achieved "viability." The plaintiffs seek declaratory and injunctive relief and have named as defendants the Governor of the State of Alabama, the Attorney General of the State of

Alabama, and the Montgomery District Attorney, in her official capacity and as a representative of the class of district attorneys for the State of Alabama. The jurisdiction of the court has been properly invoked pursuant to 28 U.S.C.A. §§ 1331 and 1343(a)(3) (West 1994).

This lawsuit is currently before the court on a motion to dismiss filed by the governor on September 4, 1997, and on a motion to dismiss filed by the attorney general and Montgomery district attorney (collectively, "the attorney general defendants"), also on September 4, 1997. A hearing was held on the motions on November 24, 1997. For the reasons that follow, the court will deny the governor's motion in its entirety, will grant the attorney general defendants' motion in part and deny it in part, and will certify certain pertinent questions of state law to the Alabama Supreme Court.

I. LEGAL STANDARD FOR MOTION TO DISMISS

In considering a defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the court accepts the plaintiffs' factual allegations as true, Jackson v. Okaloosa County, 21 F.3d 1531, 1534 (11th Cir.1994); Andreu v. Sapp, 919 F.2d 637, 639 (11th Cir.1990), and construes the complaint liberally in the plaintiffs' favor. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The action may not be dismissed unless "it appears to a certainty," Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957), that the plaintiffs can offer no set of facts supporting the relief requested. Scheuer, supra; Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir.1993).

II. BACKGROUND

The facts of this case, as alleged by the plaintiffs, are as follows. The Alabama Partial-Birth Abortion Ban Act of 1997 prohibits any physician from "knowingly" performing a "partial-birth abortion." 1975 Ala.Code § 26-23-3 (Law.Co-

op.Supp.1997).[1] Such an abortion is defined in the statute as

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[1]This act reads, in its entirety, as follows:

"§ 26-23-1. Short title.

This chapter may be cited as the 'Alabama Partial-Birth Abortion Ban Act of 1997.'

"§ 26-23-2. Definitions.

As used in this chapter, the following terms shall have the following meanings:

(1) FATHER. The biological father of the human fetus.

(2) MOTHER. The female who is pregnant with a live human fetus which may be subject to a partial-birth abortion under this chapter.

(3) PARTIAL-BIRTH ABORTION. An abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(4) PHYSICIAN. A doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state or any other individual legally authorized by the state to perform abortions. This definition shall also include any individual who is not a physician or is not otherwise legally authorized by the state to perform abortions, but who nevertheless performs a partial-birth abortion

"§ 26-23-3. Felony conviction.

Any physician who knowingly performs a partial-birth abortion within this state and thereby kills a human fetus shall be guilty of a Class C felony and upon conviction thereof shall be punished as prescribed by law.

"§ 26-23-4. Life of mother exception.

Section 26-23-3 shall not apply to a partial-birth abortion that is necessary to save the life of a mother.

"§ 26-23-5. Civil action.

The father, if married to the mother at the time she receives a partial- birth abortion procedure, and if the mother has not attained

"an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." § 26-23-2(3). Neither the term "partial-birth abortion," nor the foregoing definition, is generally accepted in the medical community.

The partial-birth abortion statute provides only a single exception to its ban, which applies where the abortion "is necessary to save the life of the mother." § 26-23-4. The act contains no similar exception to preserve the mental or physical health of the pregnant woman.

The partial-birth abortion statute carries criminal penalties, namely conviction of a Class C felony punishable by a fine of not more than $5,000 and imprisonment for up to ten years, and triggers the possibility of license revocation under Alabama law. § 26-23-3; see also 1975 Ala.Code §§ 13A- 5-6 & 13A-5-11 (Michie 1994); 1975 Ala.Code § 34-24-360(4) (Michie 1991). It also creates a civil cause of action against the physician, which may be brought by the "father" of the fetus, if married to the woman who underwent the abortion, or the "maternal grandparents" of the fetus, if the woman was a minor at the time. 1975 Ala.Code § 26-23-5 (Law.Co- op.Supp.1997).

On August 1, 1997, the day upon which the partial-birth abortion statute took effect, the Alabama attorney general forwarded a letter to four Alabama district attorneys

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the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall be limited to a monetary compensation for all injuries, psychological and physical, occasioned by a violation under this chapter and monetary punitive compensation as allowed by law. "§ 26-23-6. Conspiracy.

A woman upon whom a partial-birth abortion is performed may not be prosecuted under this chapter for a conspiracy to violate this chapter or for any other offense which is unlawful under this chapter"

instructing them that for purposes of prosecutions brought under the act, "a physician partially delivers a living fetus before killing the fetus [as proscribed by the act] when the physician deliberately and intentionally delivers into the vagina a viable fetus, or a substantial portion of the viable fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." (Emphasis added.) In the letter, the attorney general stated that his instructions to the district attorneys were given pursuant to 1975 Ala.Code § 36-15-14 (Michie 1991), which provides in pertinent part as follows: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of any criminal case in any of the courts of this state."

The second challenged act, the Alabama Abortion of Viable Unborn Child Act, prohibits any person from "intentionally, knowingly, or recklessly" performing or inducing an abortion "when the unborn child is viable." 1975 Ala.Code § 26-22-3(a) (Law.Co-op.Supp.1997).[2] However,

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[2]This act reads, in its entirety, as follows:

"§ 26-22-1. Legislative findings and intent.

(a) The public policy of the State of Alabama is to protect life, born and unborn. This is particularly true concerning unborn life that is capable of living outside the womb. The Legislature of the State of Alabama finds there are abortions being done in Alabama after the time of viability and in violation of its public policy.

(b) The Legislature specifically finds the following:

(1) Medical evidence shows there is a survival rate of babies born between ages 23 weeks to 29 weeks gestational age of 64 percent to 94 percent.

(2) In Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the United States Supreme Court determined that viability may occur as early as 23 to 24 weeks gestational age. Also, the United States Supreme Court determined that requiring fetal viability testing at 20 weeks gestational age is constitutional, because there is up to a four week

margin of error in determining gestational age.

(3) In the latest year of Alabama statistical reporting, 1994, there were reported to be 182 abortions performed at 20 or more weeks gestational age. There were also 70 abortions performed where no gestational age was stated. (c) Subject to life and health exceptions to the mother, it is the intent of the Legislature to ban abortions of any unborn child that is capable of living outside the womb. To permit otherwise is a wanton disregard of human life.

"§ 26-22-2. Definitions.

The following words shall have the following meanings:

(1) ABORTION. The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child.

(2) FERTILIZATION. The fusion of a human spermatozoon with a human ovum.

(3) GESTATIONAL AGE. The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

(4) HOSPITAL. An institution licensed pursuant to the provisions of the law of this state.

(5) LIVE BIRTH. When used with regard to a human being, means that the human being was completely expelled or extracted from his or her mother and after such separation, breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles, or any brain-wave activity.

(6) MEDICAL EMERGENCY. The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(7) PREGNANT. The female reproductive condition of having a developing fetus in the body and commences with fertilization.

(8) UNBORN CHILD AND FETUS. An individual organism of the species homo sapiens from fertilization until live birth.

(9) VIABLE AND VIABILITY. The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

"§ 26-22-3. Prohibition, exceptions, and regulations.

(a) Prohibition. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.

(b) Exceptions.

(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in the substantial and irreversible impairment of a major bodily function of the woman.

(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable.

(c) Abortion regulated. Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:

(1) The physician performing the abortion certifies in writing that, based upon his or her medical examination of the pregnant

woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or serious risk of substantial and irreversible impairment of a major bodily function.

(2) The physician's judgment with respect to the necessity for the abortion has been concurred in by one other licensed physician who certifies in writing that, based upon his or her separate personal medical examination of the pregnant woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman.

(3) The abortion is performed in a hospital.

(4) The physician terminates the pregnancy in a manner which provides the best opportunity for the unborn child to survive, unless the physician determines, in his or her good faith medical judgment, that termination of the pregnancy in that manner poses a significantly greater risk either of the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman than would other available methods.

(5) The physician performing the abortion arranges for the attendance, in the same room in which the abortion is to be completed, of a second physician who shall take control of the child immediately after complete extraction from the mother and shall provide immediate medical care for the child, taking all reasonable steps necessary to preserve the child's life and health.

(d) Penalty. Any person who violates subsection (a) commits a Class A felony. Any person who violates subsection (c) commits a Class C felony.

"§ 26-22-4. Viability testing.

Except in the case of a medical emergency, prior to performing an abortion upon a woman subsequent to her first 19 weeks of pregnancy, the physician shall determine whether, in his or her good faith medical judgment, the child is viable. When the physician has determined that a child is viable, he or she shall report the basis for his or her determination that the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. When the physician has determined that a

such a post-viability' abortion may be performed where a physician "reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman." § 26-22-3(b)(1). "Viable and viability" are defined in the act as follows:

"The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

§ 26-22-2(9).

The post-viability abortion statute also imposes five additional procedural requirements upon a physician performing a post-viability abortion in the limited medical emergency circumstances under which such an abortion is permitted. § 26-22-3(b)(1) & (c)(1)-(5). These requirements are waived where the physician, in his or her reasonable medical judgment, determines that the nature of the medical

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child is not viable after the first 19 weeks of pregnancy, he or she shall report the basis for such determination.

"§ 26-22-5. Interpretation.

Nothing in this chapter shall be construed to recognize a right to abortion or to make legal an abortion that is otherwise unlawful."

This act, as enacted, also contained the following severability provision, which was not included in the statute as codified:

"If any provision, word, phrase, or clause of this act, or the application thereof, to any person, entity, or circumstance shall be held invalid, such invalidity shall not affect the remaining provisions, words, phrases, clauses, or application of this act, which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end, the provisions, words, phrases, and clauses of this act are declared to be severable."

emergency prevents compliance. § 26-22-3(c).

Pursuant to the post-viability abortion statute, all physicians performing abortions after the nineteenth week of pregnancy must make a good- faith medical judgment as to whether the fetus is viable. §§ 26-22-2(9) & 26-22-4. However, the plaintiffs allege, the act does not specify the point at which the pregnancy begins for purposes of determining whether the pregnancy is in its nineteenth week.

The post-viability abortion statute imposes criminal penalties against the person who intentionally, knowingly, or recklessly performs or induces a post-viability abortion. §§ 26-22-3(a) & (d). Specifically, that person has committed a Class A felony, punishable by imprisonment from ten to 99 years and fines up to $20,000. § 26-22-3(d); see also 1975 Ala.Code §§ 13A-5- 2, 13A-5-6(a)(1), & 13A-5-11(a)(1) (Michie 1994). The act also criminalizes, as a Class C felony, punishable by imprisonment from one year and one day to ten years and fines up to $5,000, the failure to comply with the procedural requirements for post-viability abortions set forth in § 26-22- 3(c)(1) to (5). 1975 Ala.Code § 26-22-3(d) (Law.Co-op.Supp.1997); see also 1975 Ala.Code §§ 13A-5-2, 13A-5-6(a)(3), & 13A-5-11(a)(1) (Michie 1994).

Four plaintiffs have brought this lawsuit. They all allege that they perform abortions in the state of Alabama. Plaintiff Summit Medical Associates, P.C. provides abortions through 24 weeks of pregnancy, measured from the time of the woman's last menstrual period, or "lmp"; plaintiff William Knorr, M.D., performs abortions at Summit Medical, and intends to perform such abortions through 24 weeks lmp; plaintiff New Woman, All Women Health Care provides abortions through 20 weeks lmp; and plaintiff Beacon Women's Center provides abortions through 18 weeks lmp.

All plaintiffs perform abortions through approximately 13 weeks lmp that they allege may fall within the proscription of the partial-birth abortion statute, and each intends to continue performing such abortions despite the existence of the act, in order to provide the best possible care for patients. Summit Medical and Dr. Knorr perform abortions

through 24 1/2 weeks lmp that they allege may fall within the proscription of the post-viability abortion statute, and both intend to continue performing such abortions despite the existence of the act, in order to provide the best possible care for patients. As a consequence of these intentions, all plaintiffs allege that they fear prosecution under either or both acts.

According to the latest data from Alabama, compiled in 1995, 89% of the 14,221 abortions performed in the state were performed through the first 13 weeks lmp, 9.7% were performed from 14 through 24 weeks lmp, and less than 1% were performed after week 19 lmp, with none reported to have been performed past 24 weeks lmp. It is not known at what stage 0.88% of abortions in the state were performed.

Numerous reasons underlie the decision to perform an abortion after 13 weeks lmp (that is, after the first trimester). These include health problems arising during pregnancy, diagnosis of fetal anomalies, either severe or fatal, and lack of patient resources at an earlier date.

Requiring that a woman travel out of state for an abortion procedure introduces time delays and expense that may preclude the woman from actually obtaining a desired abortion, as well as an attendant increase in risk. Additionally, any delay imposed on a woman seeking an abortion increases both the risks to her, and the costs of the procedure.

Several methods are used to effect post-first-trimester abortions. These include: suction curretage (in limited circumstances); both traditional and intact dilation and evacuation (D&E); induction methods using saline, urea, or prostaglandins; hysterotomy; and hysterectomy. The vast majority of abortions performed after 13 weeks lmp employ traditional and intact D&E, while induction methods account for a small minority of such abortions. Hysterotomy and hysterectomy are rarely employed in Alabama as abortion techniques.

The most appropriate procedure to use in a given case depends on a multitude of factors, including the woman's

health, any medical contraindications, physician skill, the woman's prior surgical history and desire to preserve fertility, the need to remove the fetus intact, the assessment of alternative risks, cost factors, and location.

According to the plaintiffs' allegations, the methods most often employed in traditional and intact D&E procedures may fall within the strictures of the partial-birth abortion act, because parts of the fetus sometimes pass into the vaginal canal. Moreover, the main alternative to the D&E procedures, the induction method, also may fall within the act's proscription because the fetus may partially emerge during the procedure while still "living."

The hysterotomy and hysterectomy procedures are major surgical procedures that are more dangerous than their counterparts, and rarely medically appropriate. These techniques do not appear, according to the plaintiffs, to fall within the proscription of the partial-birth abortion statute.

III. THE GOVERNOR'S MOTION TO DISMISS

In his motion to dismiss this lawsuit, the governor urges this court to recognize that the "United States Constitution does not address the subject of abortion" and further urges this court to comply with the oath of office taken by all federal judges to be bound to that Constitution by ignoring any Supreme Court precedents holding to the contrary.[3] According to the governor, the Supreme Court, as "a chief 'protector' of the abortion industry in America," has run roughshod over the Constitution in its abortion jurisprudence, and has, in the absence of a national consensus, "assumed the power to amend the Constitution itself" to create abortion rights that otherwise do not exist.[4] Consequently, the governor contends, for this court to abide by the Supreme Court's abortion decisions would be tantamount to an

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[3]Governor Fob James, Jr.'s brief in support of motion to dismiss, filed September 30, 1997, at 1.

[4]Id.

abdication of its duty to uphold "the Constitution as written and as legally amended under the authority of the 'people of the United States' alone."[5]

As the plaintiffs correctly observe, the governor asks this court to contravene long-established principles of Anglo-American law by urging it to disregard plainly controlling Supreme Court precedent. The Eleventh Circuit Court of Appeals underscored these fundamental principles in Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir.1983), aff'd, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), when it reversed an Alabama district court that "chose to disregard Supreme Court precedent" in an establishment clause case. In a section of its opinion entitled "Precedent," the Eleventh Circuit explained the governing principles as follows:

"Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.... Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' [Hutto v. Davis, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556.] See also, Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983).... Judicial precedence serves as the foundation of our federal judicial system. Adherence to it results in stability and predictability. If the Supreme Court errs, no other court may correct it."

Id. at 1532-33. The court further emphasized that Supreme Court precedent is to be adhered to even where the pertinent issues are subject to political debate, stating that "While many may disagree on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final

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[5]Id. at 9.

arbiter of constitutional disputes." Id. at 1536.

It cannot seriously be disputed that these bedrock principles apply with equal force to the Supreme Court's abortion jurisprudence, despite the sharp differences in public opinion that surround this politically-charged issue. For without these governing principles, embodied in the notion of the "rule of law", judges would be at liberty to pick and choose which Supreme Court decisions they wished to follow, with the result that no one would ever know what law applied to the citizenry of this country at any given time: chaos and anarchy would reign. The federal judicial system can no more operate under a scheme in which lower court judges could freely pick and choose higher court precedent than the governor could govern under a scheme in which state citizens to whom he is beholden could freely pick and choose the laws with which they would comply. It may be that Supreme Court abortion jurisprudence is "wrong," but the avenue for redress is to convince the Supreme Court itself to change its precedent or, failing that, to convince the people of the Country to amend the Constitution.

This court, therefore, will adhere to the controlling Supreme Court decisions pertaining to the regulation and proscription of abortions. Notwithstanding any allegations by the governor or the other defendants that these decisions are based on faulty premises or are otherwise infirm, this court refuses to disregard binding Supreme Court precedent, for it is that Court's prerogative alone to overrule one of its own precedents. See State Oil Co. v. Khan, --- U.S. ----, ----, 118 S.Ct. 275, 284, 139 L.Ed.2d 199 (1997). Accordingly, the court will deny the governor's motion to dismiss.

IV. ATTORNEY GENERAL DEFENDANTS' JURISDICTIONAL CHALLENGES

In addition to arguing that the plaintiffs have failed to state any claim in their complaint upon which relief may be granted, the attorney general defendants have raised a number of challenges to this court's authority to exercise jurisdiction over the plaintiffs' claims. It is to these challenges, which implicate numerous complex questions of federal

jurisdiction, that the court must first devote its attention.

Careful parsing of the briefs filed by the attorney general defendants reveals that they attempt to erect three distinct sets of jurisdictional hurdles to the bringing of this lawsuit in federal district court: first, that the plaintiffs' claims are barred by the eleventh amendment of the United States Constitution, which immunizes all of the named defendants from suit; second, that the court must abstain from hearing the plaintiffs' claims in view of various principles of comity and equity; and, third, that none of the plaintiffs' claims is justiciable because none satisfies the case-or- controversy requirements imposed by Article III of the United States Constitution. Unfortunately, but understandably, given the complexity of the issues involved and the opacity of the pertinent case law, the attorney general defendants in their briefs conflate, rather than treat as analytically distinct, the myriad issues raised by their various jurisdictional challenges. The plaintiffs, too, fail to address all of these issues in an organized fashion.

For the sake of clarity, and to ensure that it fully and properly resolves each of the attorney general defendants' challenges, the court will address them separately and systematically. First, it will determine whether, as the attorney general defendants contend, all of the plaintiffs' claims are barred by the eleventh amendment, so that the entire lawsuit must be dismissed. Next, the court will ascertain whether the suit as a whole, or any subset of the plaintiffs' claims, must be dismissed for lack of an Article III case or controversy. To resolve this issue, the court will address whether the plaintiffs enjoy standing to bring their various claims, as well as whether any of these claims has been rendered moot, and hence non-justiciable, in light of the defendants' post-filing actions. Finally, the court will determine whether any of the abstention doctrines, grounded on considerations of comity between the state and federal judicial systems, and on principles that govern federal courts sitting in equity, counsels dismissal of any of the plaintiffs' claims, or a stay pending resolution by the Alabama Supreme Court of any issues raised by these claims. As explained more fully below, with respect to the majority of the plaintiffs' claims for declaratory relief,

the court rejects all of the foregoing arguments proffered by the attorney general defendants, and will proceed to address whether the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted. However, the court will dismiss all claims for injunctive relief, because the plaintiffs have not satisfied the heavy burden required to establish a right to such relief under pertinent Supreme Court jurisprudence. Additionally, the court will certify, to the Alabama Supreme Court, questions of statutory construction pertinent to some of the plaintiffs' claims.

A. Eleventh Amendment Immunity

The attorney general defendants base their first challenge to the plaintiffs' right to bring this lawsuit on the eleventh amendment of the United States Constitution, which provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Eleventh amendment sovereign immunity has been held to apply to suits brought by citizens against their own state, and is likewise applicable to cases in which the court's jurisdiction is grounded on the existence of a federal question. See Seminole Tribe v. Florida, 517 U.S. 44, 68-74, 116 S.Ct. 1114, 1130-32, 134 L.Ed.2d 252 (1996). Here, it is undisputed that citizens of Alabama have sued Alabama state officials pursuant to the fourteenth amendment of the United States Constitution, and that the state has not waived its eleventh amendment sovereign immunity and thereby consented to suit. Consequently, as the parties recognize, the lawsuit must be dismissed, unless it falls within a longstanding--and still vital--exception to eleventh amendment immunity, first articulated by the Supreme Court in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law. The Court has explained this exception, commonly referred to as the Ex parte Young doctrine, as follows: "The theory of Young was that an

unconstitutional statute is void, and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.' Young also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. We have refused to extend the reasoning of Young, however, to claims for retrospective relief." Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985) (internal citations omitted). The Supreme Court has characterized the "authority-stripping" theory of Ex parte Young as a "fiction," because it creates an imaginary distinction between the state and its officers, deeming that the officers act without the state's authority when enforcing state laws in derogation of the Constitution. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n. 25, 104 S.Ct. 900, 915 n. 25, 79 L.Ed.2d 67 (1984).

The parties are correct to observe that no defendant in the handful of challenges to partial-birth abortion statutes initiated in other federal district courts has attempted to evade suit on the basis of eleventh amendment immunity, and thus this issue is one of first impression in the partial-birth abortion arena. Moreover, the court is aware of only three decisions addressing general abortion statutes in which such a defense was raised. See Jane L. v. Bangerter, 794 F.Supp. 1528, 1530-31 (D.Utah 1992) (finding that the State of Utah had expressly and voluntarily waived its eleventh amendment immunity in a challenge to an abortion statute); Guam Society of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422, (D.Guam 1990) (holding that the eleventh amendment did not bar injunctive relief against enforcement of an abortion statute by the governor and attorney general of Guam), aff'd, 962 F.2d 1366 (9th Cir.1992); Akron Center for Reproductive Health v. Rosen, 633 F.Supp. 1123, 1128-30 (N.D.Ohio 1986) (holding that the state governor and attorney general were not proper parties in a constitutional challenge to an abortion statute, because enforcement of the challenged statute was clearly delegated to the prosecuting attorneys of the state, two of whom were found to be proper defendants in the action), aff'd sub nom., Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir.1988), rev'd on other grounds sub nom., Ohio v. Akron Center for Reproductive Health,

497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990).

Not surprisingly, the parties vigorously contest whether the Ex parte Young doctrine applies to this suit.

The attorney general defendants, predictably, assert that the plaintiffs' broad claims for relief may not be squeezed and contorted to fit within the extremely narrow confines carved out for the doctrine by applicable Supreme Court jurisprudence. The plaintiffs, by contrast, assert that the attorney general defendants, by misconstruing the pertinent case law, seek unduly to constrain the Ex parte Young doctrine in clear contravention of long-settled Supreme Court precedent.

The dispute surrounding this question, once stripped of all irrelevant rhetoric pertaining to the distinct issues of justiciability and abstention, which will be taken up below, may be distilled to two primary issues. First, the attorney general defendants argue, and the plaintiffs vigorously contest, that although the plaintiffs seek relief that is purely prospective, and so arguably falls within the purview of the Ex parte Young doctrine, the specific relief sought is sufficiently intrusive and connected to the state itself that the "fiction" worked by that doctrine should play no role here. The second primary argument proffered by the attorney general defendants in support of their eleventh amendment immunity claim is grounded on the Ex parte Young doctrine's requirement that the challenged conduct of the state officials be "ongoing" or "continuing," and not merely "threatened," for the exception to apply. The attorney general defendants contend that the plaintiffs face, at most, a speculative threat of prosecution under the statutes, and that consequently their claims do not qualify for the Ex parte Young exception. As explained more fully below, the court rejects both of these arguments, and holds that the plaintiffs' claims for declaratory and injunctive relief against the Alabama state officials fall squarely within the Ex parte Young doctrine as currently interpreted and applied by the Supreme Court.

In support of the their first argument regarding eleventh amendment immunity, the attorney general defendants rely primarily on the Supreme Court's recent

decision in Idaho v. Coeur d'Alene Tribe of Idaho, --- U.S. ----, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). In that case, the Court was confronted with the question of whether an eleventh amendment bar prevented a federal district court from adjudicating the Coeur d'Alene tribe's claims for declaratory and injunctive relief against the State of Idaho concerning the submerged lands and bed of Lake Coeur d'Alene, as well as various associated elements of the lake's water system. --- U.S. at ----, 117 S.Ct. at 2040. The relief sought by the tribe, characterized by the Court as "far-reaching and invasive," included declaratory relief to establish its entitlement to occupy and use the submerged lands, and injunctive relief to prohibit the state from regulating, or permitting or taking any action in violation of, the Tribe's exclusive rights of use and occupancy, quiet enjoyment and other ownership interest in the submerged lands. Id., --- U.S. at ----, ----, 117 S.Ct. at 2032, 2040.

The majority, while recognizing that "An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction," refused to apply the exception under the "particular and specific circumstances" of the case. Id. at ----, ----, 117 S.Ct. at 2040, 2043. In reaching its decision, the Court emphasized that the extensive relief sought by the tribe, at least in functional terms, was tantamount to a quiet title suit, which all agreed would be barred by the eleventh amendment absent waiver by the state. The Court explained:

"It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it. Despite this prohibition, the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe."

Id. at ----, 117 S.Ct. at 2040. Thus, the Court was plainly concerned that permitting the tribe to pursue the suit in federal court would constitute an impermissible affront to the state's sovereignty, and that such concerns must be given

weight even where the plaintiffs' claims formally are limited to declaratory and injunctive relief.

Despite the attorney general defendants' efforts to characterize the instant case as one raising such a conflict between the plaintiffs' claims for extensive relief and fundamental elements of state sovereignty, the court concludes that the holding in Coeur d'Alene is inapplicable to the facts presented here. The plaintiffs' desired relief, though it effectively would wipe two recently-enacted state statutes off the books, cannot be said to be as far-reaching or intrusive as that sought in Coeur d'Alene; here, unlike in Coeur d'Alene, the state's sovereign interest in exercising its authority over the challenged arena (certain forms of abortion) would not be so fundamentally diminished or eliminated because the state would be free to enact new, appropriate legislation if the relief sought were to be granted. By contrast, were the tribe in Coeur d'Alene to prevail on its claims in federal court, Idaho would have irretrievably lost, for all time, practically its entire power to regulate the disputed submerged lands. On this point, the Supreme Court was emphatic:

"The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands."

--- U.S. at ----, 117 S.Ct. at 2040. Simply stated, the plaintiffs here, unlike the Coeur d'Alene tribe, do not seek relief that is tantamount to relief that they are barred from obtaining from the state absent waiver of eleventh amendment immunity.

The foregoing conclusion is not undermined by the holdings in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39

L.Ed.2d 662 (1974), and Green v. Mansour, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), where the Supreme Court refused to apply the Ex parte Young doctrine despite the absence in the complaints in question of any claims for retroactive or monetary relief. Those cases, like Coeur d'Alene, presented the Court with circumstances in which the plaintiffs' claims, although couched in terms of injunctive or declaratory relief, would have had an effect on the states akin to a request for monetary damages or restitution. See Green, 474 U.S. at 73, 106 S.Ct. at 428 (holding that the eleventh amendment barred a claim for declaratory relief because issuance of such a judgment would have had "much the same effect as a full-fledged award of damages or restitution by the federal court"); Edelman, 415 U.S. at 665-66, 94 S.Ct. at 1356-57 (holding that relief labeled "equitable" in nature may fall outside the Ex parte Young doctrine, and hence be barred by the eleventh amendment, where the funds to satisfy the award must inevitably come from the state's general revenues).

It is difficult to imagine how the equitable relief sought by the plaintiffs in this action could have even a slight impact on Alabama's coffers, for the plaintiffs request neither compensatory damages nor retrospective relief of any type. Rather, in terms of the nature of the relief sought by the plaintiffs, this case conforms to the prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law.

The second issue that the court must address in relation to the attorney general defendants' eleventh amendment immunity argument concerns the assertion that the Ex parte Young exception is inapplicable here because the plaintiffs have failed to allege that the defendants are engaged in the requisite 'ongoing or continuing' violation of the Constitution or of federal law. According to the attorney general defendants, because the plaintiffs assert, at most, an extremely remote threat that prosecutions would be brought under the two challenged acts, they cannot possibly have alleged a constitutional violation that is 'ongoing or continuing' in nature.

The defendants correctly observe that the Supreme Court has employed the terms 'ongoing' and 'continuing' to describe constitutional and federal law violations that trigger the Ex parte Young exception. See, e.g., Coeur d'Alene, --- U.S. at ----, 117 S.Ct. at 2043 ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); Green, 474 U.S. at 67-68, 106 S.Ct. at 425-426 ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

Importantly, however, the attorney general defendants misconstrue the Supreme Court's use of those terms when they assert that the plaintiffs cannot satisfy the "ongoing or continuing" violation requirement because the challenged statutes are so freshly minted, and because no citizen has yet been targeted for prosecution. Specifically, the attorney general defendants fail to recognize that Ex parte Young itself addressed, and the doctrine it spawned applies to, situations in which prosecutions under a disputed state law are merely threatened, rather than underway or complete. See, e.g., Ex parte Young, 209 U.S. at 159-60, 28 S.Ct. at 454 (in pre enforcement challenge brought against state railroad ratesetting scheme, Court holds that "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in this person to the consequences of his individual conduct, the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."); Steffel v. Thompson, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (1974) (characterizing Ex parte Young as "holding that state officials who threaten to enforce an unconstitutional state statute may be enjoined by a federal court of equity") (emphasis added). In fact, the Supreme Court, in Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986), explained that in this context the term "ongoing"

is used in contradistinction to "cases in which federal law has been violated at one time or over a period of time in the past." (Emphasis added). In the latter situation, of course, compensatory relief would be implicated, and so recourse to Ex parte Young would be unavailing. See id.

For a violation of federal rights to be considered "ongoing," then, does not require that a prosecution under the challenged state statute be in progress, but rather that the alleged violation of federal rights not have taken place only in the past, such that only retrospective relief may be obtained. Here, the plaintiffs contend that they face a continuing threat of prosecution and civil liability under the two disputed acts, and that as a consequence they are unable to freely exercise their asserted constitutional rights without fear of arrest, prosecution or being haled into court pursuant to the acts' civil provisions. Moreover, both the governor and the attorney general have indicated that they intend to prosecute violators under the two abortion statutes. Accordingly, the court rejects the attorney general defendants' contention that application of the Ex parte Young doctrine is inappropriate on these facts because there are no "ongoing" prosecutions pending or contemplated against the plaintiffs.

It bears noting that in proffering these arguments regarding the absence of a pending prosecution the attorney general defendants conflate the considerations underlying the eleventh amendment immunity issue with those raised by both their Article III challenge to the justiciability of the plaintiffs' claims and their contention that the court should abstain from hearing this lawsuit under principles of equity and comity.[6] The court does recognize, of course, that the absence of a legitimate threat of prosecution under the challenged acts would derail the plaintiffs' suit on grounds

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[6]For instance, the attorney general defendants support their claim of eleventh amendment immunity by invoking the standards employed by courts to determine whether an Article III case or controversy has been raised, as well as those considered by federal courts in deciding whether to abstain from hearing a lawsuit so that the state's courts may first interpret an unclear state statute.

of lack of an Article III case or controversy. However, the court will not address these issues in the context of determining whether the eleventh amendment imposes a bar to this action, for they enjoy no relevance here. Rather, the court will reserve consideration of these issues until after the eleventh amendment question has been resolved, when it turns to questions of justiciability. In so doing, the court endeavors to avoid contributing to the general confusion and inconsistent reasoning that plagues much of the existing jurisprudence in this complex area of federal jurisdictional law.

The attorney general defendants also devote substantial space in their briefs to an argument that the Alabama state courts offer an adequate forum for the plaintiffs to vindicate their asserted fourteenth amendment rights, and so the Ex parte Young doctrine should not be applied to ensure a federal forum. This argument is inapt, however, because the attorney general defendants apparently proffer it on the mistaken assumption that this court's determination of the eleventh amendment immunity issue is governed by the case- by-case, balancing of state and federal interests approach espoused by Justice Kennedy in Parts II-B, II-C, and II-D of the principal opinion in Coeur d'Alene. An integral part of Justice Kennedy's approach, upon which the attorney general defendants place heavy reliance, is that courts should inquire into whether there are "special factors counselling hesitation" in exercising jurisdiction over claims against state officials in federal court. See Coeur d'Alene, U.S. at 2028, 117 S.Ct. at 2039 (quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971)). However, as the attorney general defendants themselves acknowledge, Justice Kennedy's approach in Parts II-B, II-C, and II-D of the principal opinion, including his injection of the Bivens-based inquiry into the Ex parte Young context, was shared by only one other member of the Court, Chief Justice Rehnquist; it was not only not adopted by a majority of the Justices, it was subject to express criticism by the seven remaining Justices. See Coeur d'Alene, U.S. at 2028, 117 S.Ct. at 2047 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) ("the principal opinion replaces a straightforward inquiry into whether a

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors"); --- U.S. at ---- n. 6, ---- - ----, 117 S.Ct. at 2051 n. 6, 2055-58 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) (rejecting the principal opinion's balancing approach and its consideration of the adequacy of available state remedies in determining whether the Ex parte Young doctrine may be invoked). Thus, the attorney general defendants' assertions regarding the adequacy of the forum provided by the Alabama state courts for the adjudication of the constitutional issues raised by the plaintiffs' claims play no role in the court's analysis of the eleventh amendment immunity question. As Justice O'Connor stated in Coeur d'Alene: Ex parte Young is "applied '[e]ven if there is a prompt and effective remedy in a state forum. When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar.' " Id., --- U.S. at ----, 117 S.Ct. at 2045 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) (citations omitted). This action, therefore, falls squarely within the well- established boundaries of the Ex parte Young doctrine, and the court is not persuaded otherwise by the fact that Alabama state courts stand ready and able to hear the plaintiffs' claims.

Moreover, to the extent that the attorney general defendants take the position that the plaintiffs must await a state criminal prosecution to secure their desired relief, their argument flies in the face of one of the central rationales underlying the Ex parte Young decision. In that case, the Supreme Court emphasized that those challenging the state criminal laws at issue faced heavy sanctions, including fines and imprisonment, if they opted to pursue their claims by disobeying the disputed laws and inviting state criminal prosecutions. The court reasoned: "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147, 28 S.Ct. at 448.

In the case at bar, the plaintiffs also face significant criminal sanctions for violation of the two challenged acts. Thus, no matter how faithfully the Alabama state courts would apply Supreme Court abortion jurisprudence in resolving an attack on the disputed statutes during a criminal proceeding, the court is not dissuaded from applying the Ex parte Young doctrine here. A state court criminal prosecution, with its attendant risk of heavy sanctions, simply is not an adequate forum for the vindication of the plaintiffs' constitutional rights.

For the foregoing reasons, the court rejects the attorney general defendants' contention that the plaintiffs' claims against them and the governor are precluded by the eleventh amendment to the United States Constitution.

B. Article III Case-or-Controversy Requirement

Because the court has concluded that the eleventh amendment does not bar this lawsuit from federal court, it must next address whether it may exercise jurisdiction over the plaintiffs' claims in view of a second constitutional barrier, the case-or-controversy requirement imposed by Article III. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' " Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S.Ct. 752, 757-58, 70 L.Ed.2d 700 (1982) (quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)) (citations omitted). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." Diamond v. Charles, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986).

The attorney general defendants contend that this threshold requirement has not been satisfied here, on two grounds. First, they argue that the plaintiffs do not enjoy standing to bring their claims for declaratory and injunctive relief in federal court. Second, they contend that any case or

controversy between the parties has been rendered moot as a result of the attorney general's directive to four district attorneys that they refrain from pursuing prosecutions under the partial birth abortion statute except under limited circumstances. The court will take up these two arguments in turn below.

i. Standing

A party must have standing to bring a lawsuit, for without it a federal court may not exercise jurisdiction to decide the underlying case. See Brooks v, Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1375 (11th Cir.1997) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). Standing encompasses both "constitutional requirements" imposed by Article III, and "prudential considerations." Valley Forge, 454 U.S. at 471, 102 S.Ct. at 757; see Brooks, 116 F.3d at 1375. To satisfy the constitutional mandates, a plaintiff must establish that: (1) she personally has suffered some actual or threatened injury as a result of the allegedly illegal conduct; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision by the federal court. See Valley Forge, 454 U.S. at 472, 102 S.Ct. at 758.

The prudential considerations governing the standing determination, on the other hand, include: (1) the principle that federal courts should avoid deciding generalized grievances presenting abstract questions of wide public significance; (2) the requirement that the plaintiff's claims fall within the zone of interests protected by the statute or constitutional guarantee at issue; and (3) the requirement that a plaintiff assert her own legal rights and interest, rather than the rights of third parties. See Church v. City of Huntsville, 30 F.3d 1332, 1335-36 (11th Cir.1994).

The attorney general defendants proffer three primary arguments in support of their contention that the plaintiffs

lack standing to bring this lawsuit in federal district court. First, with respect to both challenged statutes, the attorney general defendants argue that none of the plaintiffs has satisfied the first constitutional standing requirement recited above because none is able to establish the existence of any actual or threatened injury. Second, regarding the post-viability abortion statute, the attorney general defendants assert that none of the plaintiffs enjoys standing to bring this lawsuit because none engages in the specific conduct proscribed by the act. Finally, regarding the partial-birth abortion ban act, the attorney general defendants contend that none of the abortion clinic plaintiffs has standing because application of that act is explicitly limited to "physicians" or "any other individuals," and does not encompass entities such as hospitals or clinics.

Resolution of the issues raised by the first attack on the plaintiffs' standing, that they have established no actual or threatened injury, is governed by Supreme Court decisions that have addressed other challenges to the constitutionality of state criminal statutes. In one such decision, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979), the Supreme Court explained that "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." However, the Supreme Court emphasized that a legitimate threat of injury is sufficient to navigate the shoals of standing: "But 'one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " Id. (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923)). Nor does one who asserts that a criminal statute deters the exercise of her constitutional rights need first expose herself to actual arrest or prosecution before proceeding with her claim in federal court. Id., 442 U.S. at 298, 99 S.Ct. at 2309. See also Doe v. Bolton, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) (physicians challenging constitutionality of abortion statutes have standing "despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution.... They should not be required to await and undergo a criminal prosecution as the sole means

of seeking relief.") Accordingly, the Court held in Babbitt that the standing requirement may be satisfied "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." 442 U.S. at 298, 99 S.Ct. at 2309.

The record before the court establishes that the plaintiffs have indeed alleged their intention to continue to conduct abortion operations, which the Supreme Court arguably has sheathed in a constitutionally-protected mantle, and which the plaintiffs assert to be proscribed by the two challenged statutes. Thus, the question before the court is whether the plaintiffs have succeeded in alleging that they do in fact face a "credible threat of prosecution" under the two abortion statutes at issue here.

A credible threat, of course, must be more than merely imaginary or speculative, see Babbitt, 442 U.S. at 298, 99 S.Ct. at 2309, but must be both "real and immediate, not conjectural or hypothetical." O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). It is also important to note that the court looks to the plaintiffs' allegations in determining the standing issue, for while it is true that the plaintiffs must demonstrate an immediate threatened injury as a prerequisite to obtaining preliminary injunctive relief, they need only allege such injury to establish their standing. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980).

Applying the foregoing principles to the facts presented here, the court has no difficulty concluding that the plaintiffs have indeed made sufficient allegations of a credible threat of prosecution to establish their standing to bring this lawsuit. As was the case in Bolton, the plaintiffs here challenge vital statutes of recent vintage, and there is nothing in the record to suggest that the state authorities will refrain from bringing prosecutions under them to the full extent permitted by the statutes' provisions. Although, as discussed more fully below, the Alabama attorney general has instructed four district attorneys to pursue prosecutions under the partial-birth abortion enactment only under

particular circumstances, the court is unaware of any evidence to suggest that the plaintiffs do not risk prosecution under either challenged act for performing certain of their abortion procedures, especially in view of the plaintiffs' allegations concerning the vagueness of, and broad net cast by, the statutes. Simply stated, the two challenged abortion acts are vital enactments that the state shows no indication of ignoring, and that, if the plaintiffs' allegations are accepted as true, specifically target procedures that the plaintiffs provide to their patients on an ongoing basis. Thus, the court concludes that the plaintiffs have indeed alleged that they face a sufficiently credible threat of enforcement to establish their standing to sue.

The attorney general defendants dispute that the alleged threat to the plaintiffs is sufficiently direct and immediate to imbue them with standing, citing Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), and a Fourth Circuit decision, Doe v. Duling, 782 F.2d 1202, 1208 (1986), to argue that the plaintiffs must show more to establish standing than the fact that state officials "stand ready to perform their general duty to enforce laws." Examination of the factual contexts presented in Ullman and Duling, however, reveals that these cases are a far cry from the instant dispute with respect to the immediacy of the threat that the plaintiffs allegedly face.

For instance, in Ullman, the plaintiffs sought to challenge in federal district court a Connecticut statute enacted in 1879 that purported to prohibit the rendering of medical advice on the use of contraceptives. That hoary statute had never, with a single possible exception, been used to prosecute any physicians. Similarly, the Virginia statutes under attack in Duling, which proscribed "fornication and cohabitation," had never been used as a basis for arrests or prosecution, except in the limited contexts of prostitution or non-private behavior, which were not at issue in the suit. The unmarried plaintiffs in Duling, claiming to be fearful of prosecution under the statutes for cohabitating or engaging in sexual intercourse, sought declaratory and injunctive relief. In both cases, the courts refused to hold that the plaintiffs had established standing, because of the remoteness of the

possibility that they would ever be prosecuted under the challenged statutes.

Ullman and Duling may best be characterized as unusual cases in which the plaintiffs sought to wipe disfavored, and allegedly anachronistic, laws off the books. In fact, the Supreme Court in Bolton distinguished the live abortion statute at issue in that case from the statute challenged in Ullman, tersely observing that the former was "recent and not moribund." Bolton, 410 U.S. at 188, 93 S.Ct. at 746. Likewise, this court notes that the two acts at issue in the instant dispute are far from moribund,[7] and the plaintiffs' objective is not merely to expunge allegedly obsolete laws from the state's books. Rather, the plaintiffs here challenge newly-minted laws bearing directly on their professional activities and the source of their livelihood. As a result, the holdings in Ullman and Duling have little to say in the present context.

Nor do the Supreme Court decisions in Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), O'Shea v. Littleton, supra, or City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), resuscitate the defendants' argument. In each of these cases, the Court's holding that the plaintiffs lacked standing stemmed primarily from the fact that future unconstitutional injury to the plaintiffs was far too conjectural, being subject to contingencies that were, at best, only remotely possible, to be sufficiently real and immediate. For instance, in Golden, the plaintiff sought a declaratory judgment invalidating a statute that

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[7]The attorney general defendants do, in effect, argue that the partial-birth abortion ban act is moribund when they assert that no prosecutions for pre-viability abortions will be brought under the act as a consequence of the attorney general's letter to the district attorneys. However, this contention properly is addressed under the mootness element of the Article III case or controversy requirement, and the court will address it as such below, where it finds, to paraphrase Mark Twain, that the attorney general defendants' reports of the statute's demise are greatly exaggerated.

prohibited the distribution of anonymous handbills pertaining to election campaigns. Under the particular circumstances of the case, the only possible threatened prosecution would have revolved around the plaintiffs' distribution of handbills concerning a single congressional candidate, who had been appointed to the Supreme Court of New York for a 14-year term, and hence would be unlikely to run for Congress again. The Court held that, given this scenario, it was "wholly conjectural" that any future prosecutions would be advanced against the plaintiff, and that, as a consequence, he did not have standing to sue for declaratory relief. Similarly, in both Lyons and O'Shea, any future recurrences of the putative threatened injury against the plaintiffs hinged upon two speculative events: first, that the plaintiffs would proceed to violate an unchallenged criminal law; and, second, that, in the course of the defendants' response to that violation (in Lyons, the defendant city's police officers' use of control holds during arrest; and in O'Shea, the defendant county magistrate and circuit court judge's setting of bond, sentencing and jury fee-setting), they would subject the plaintiffs to the allegedly unconstitutional practices. No such remote and unlikely contingencies exist here, where the plaintiffs allege that they, by pursuing the very activities upon which their careers or businesses are based, will act in a manner that subjects them to prosecution under the allegedly unconstitutional statutes. Unlike the plaintiff in Lyons, the plaintiffs here need not base the threat of a potential justiciable injury on "incredible assertion[s]" regarding the conduct of third parties. 461 U.S. at 105-06, 103 S.Ct. at 1667.

Having found that the plaintiffs have alleged a sufficiently credible threat of injury to confer standing upon them, the court must next address the other, more straightforward challenges to the plaintiffs' standing raised by the attorney general defendants. As stated, the attorney general defendants assert that, with respect to the post-viability abortion statute, none of the plaintiffs can satisfy the case-or-controversy requirement because they do not perform the proscribed types of abortion procedures. In support of this argument, the attorney general defendants place great emphasis on the Sixth Circuit's decision in Akron Ctr. for Reproductive Health, Inc. v. City of Akron, 651 F.2d

1198 (6th Cir.1981), rev'd in part on other grounds, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), which concerned a statute, like the post-viability abortion statute at issue here, that proscribed abortions after "viability," except where necessary to prevent impairment of the pregnant woman's health or her death. The Akron ordinance, however, unlike the statute addressed here, established a presumption of viability at 24 weeks after lmp (that is, the start of the third trimester of pregnancy) Akron Ctr. for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1185 (N.D.Ohio 1979). The Sixth Circuit affirmed the district court's holding that physician-plaintiffs who were not performing abortions beyond the first trimester (which ends at approximately 12 weeks after lmp), and who expressed no intention to perform such abortions, lacked standing in their own right to challenge the ordinance at issue. Akron, 651 F.2d at 1210-11. Moreover, the court rejected the plaintiffs' argument that they enjoyed third-party standing on behalf of those patients they counseled regarding post-first trimester abortions, again because they entertained no intent to themselves perform the abortions. Id.

Plainly, the Akron court's holding was a consequence of the undisputed fact that abortions carried out before the end of the first trimester, which constituted the limit beyond which the Akron plaintiffs did not perform abortions, take place well before the presumptive point (the start of the third trimester) at which the city ordinance proscribed abortion procedures. Here, by contrast, Alabama's post-viability abortion statute, while prohibiting all abortions performed after the fetus has reached "viability," does not explicitly define that critical juncture in terms of a point in time, nor does it set forth a presumption regarding when viability commences. Rather, the act defines "viable and viability" broadly as follows:

> "The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

1975 Ala.Code § 26-22-2(9) (Law.Co-op.Supp.1997). Additionally, Alabama's post-viability abortion statute, unlike the Akron ordinance, prescribes viability testing prior to abortions that are performed after 19 weeks of pregnancy. § 26-22-4.

As the attorney general defendants concede, plaintiffs Summit Medical and Dr. Knorr have alleged that they perform abortions as late as 24 weeks lmp. Thus, they would be required under the act to comply with the viability- testing strictures prior to performing certain abortions, and would be forbidden to pursue abortions where the tests indicated fetal viability.[8] Thus, these plaintiffs are unquestionably subject to the express language of the act, and therefore have standing to challenge it.

Moreover, on the record before it the court cannot conclude that the late- second-trimester abortions performed by all plaintiffs would fall outside the act's definition of post-viability abortions.[9] The plaintiffs aver that the act's definition of viability is so broad that it could be interpreted to encompass these late-term abortions. Unlike the ordinance considered by the court in Akron, Alabama's post-viability abortion statute does not employ a presumptive date for the existence of a viable fetus, and so the court is unable to conclude

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[8]The attorney general defendants urge the court to conclude that these plaintiffs do not in fact perform the proscribed post-viability abortions, because the plaintiffs themselves define viability as commencing at approximately 24 to 28 weeks lmp. The court declines this invitation. How the plaintiffs define viability in their pleadings is immaterial; rather, in deciding this motion to dismiss, the court must examine the act and determine whether it could reasonably be construed to encompass the conduct engaged in by the plaintiffs, irrespective of how the parties interpret the relevant provisions.

[9]According to the plaintiffs' pleadings, plaintiff Beacon Women's Center provides abortions up to 18 weeks lmp, and plaintiff New Women, All Women Health Care provides abortions through 20 weeks lmp.

definitively that abortions performed by any of the plaintiffs fall outside of the range of abortions proscribed by the act. Thus, the court finds that all plaintiffs have presented allegations sufficient to establish that they could be subject to the criminal sanctions imposed by the post-viability abortion statute for certain abortions that they perform. [10]

In their final standing volley, the attorney general defendants contend that none of the medical clinic plaintiffs has standing to challenge the partial-birth abortion statute because the statute, by its express terms, imposes criminal or civil liability only upon "physicians" or "any other individuals," and does not encompass such entities as hospitals or clinics. The court does not need to reach the merits of this argument, however, because it is not disputed that one of the named plaintiffs, Dr. Knorr, is indeed a "physician" who risks criminal and civil liability for performing abortion operations proscribed by the partial-birth abortion statute. Because Dr. Knorr has standing to pursue the full extent of the plaintiffs' claims directed to that act, the court may exercise jurisdiction over these claims, and need not ascertain whether the other plaintiffs also have standing. See Carey v. Population Services, Intern., 431 U.S. 678, 682, 97 S.Ct. 2010, 2014, 52 L.Ed.2d 675 (1977) (determination that

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[10]The attorney general defendants also complain that defendant Ellen Brooks, the Montgomery County district attorney, is not a proper party to this lawsuit because the only plaintiff abortion provider located within Montgomery County, Beacon Women's Center, does not perform the procedures proscribed by either statute. However, for the reasons provided above, the court has concluded that Beacon Women's Center does have standing to sue here in view of the plaintiffs' allegations that the statutes' broad definitions of the proscribed procedures could encompass abortions performed by Beacon Women's Center and the other plaintiff abortion providers. Thus, the court rejects the attorney general defendants' contention, at the motion-to-dismiss stage, that Brooks is not a proper party to this lawsuit. If, at a later juncture in this lawsuit, the attorney general defendants can proffer facts establishing that Brooks should be dismissed from this suit, the court would of course revisit this issue.

at least one plaintiff has standing to challenge all aspects of asserted claims obviates need to determine standing of other plaintiffs); see also Planned Parenthood Ass'n v. Miller, 934 F.2d 1462, 1464-66 n. 2 (11th Cir.1991). [11]

For the foregoing reasons, the court concludes that the plaintiffs have satisfied the standing component of the case-or-controversy requirement. However, before it may put aside its copy of Article III, the court must address another aspect of the case-or-controversy requirement, namely whether the plaintiffs' claims have been rendered moot by the attorney general's letter to the four district attorneys regarding enforcement of the partial-birth abortion statute. This issue is taken up in the following section.

ii. Mootness

As a threshold matter, the court notes that the mootness contention is limited to the plaintiffs' claims concerning the partial-birth abortion statute, because the attorney general's directive expressly pertained only to that statute. Nothing in the record indicates that the attorney general has placed any limitation on the enforcement of the post-viability abortion statute.

The plaintiffs aptly analogize the mootness issue presented here to claims of mootness grounded on a defendant's "voluntary cessation" of challenged conduct. The analogy fits because, as explained below, there is no evidence to suggest that the attorney general's letter can be deemed binding for all time and for all possible future prosecutions under the statute. Rather, the letter is more accurately construed as an expression of the attorney general's current, but readily alterable, position.

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[11]The plaintiffs contend that under Alabama criminal law pertaining to corporate and accomplice liability principles, the clinics would indeed be exposed to criminal liability for the acts of the physicians and other medical personnel under their employ. As stated, however, the court will not address these arguments because Dr. Knorr, as an individual physician, enjoys standing to sue.

The Supreme Court has emphasized the stringency of the test for mootness under such circumstances, in recognition of the fact that "the defendant is free to return to his old ways." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n. 10, 102 S.Ct. 1070, 1074 & n. 10, 71 L.Ed.2d 152 (1982); United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); see also Secretary of Labor v. Burger King Corp., 955 F.2d 681, 684 (11th Cir.1992). Thus, a case may be moot only if it becomes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-204, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968). The "heavy burden" to make this showing rests squarely on the defendants' shoulders. See Burger King, 955 F.2d at 684. At least one court has held that the voluntary cessation must be legally binding and judicially enforceable. See Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 563 (2d. Cir.) (holding that the defendant's mere promise to abstain from the challenged action, in the absence of a binding settlement or other judicially- enforceable agreement, does not render the controversy moot), cert. denied, 501 U.S. 1218, 111 S.Ct. 2829, 115 L.Ed.2d 998 (1991).

On the record before it, the court concludes that the attorney general defendants have failed to meet their heavy burden of establishing that the voluntary decision to place limitations on prosecutions under the partial-birth abortion statute is permanent. Nothing in the record persuades the court that the letter, even if it is binding on the district attorneys to whom it was addressed, is not subject to revision or rescission at the attorney general's sole discretion. In the letter itself, the attorney general stated that he relied upon 1975 Ala.Code § 36-15-14 (Michie 1991) in instructing the district attorneys regarding how the partial-birth abortion statute was to be construed for enforcement purposes. That provision provides in pertinent part as follows: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of

any criminal case in any of the courts of this state."[12] As counsel for the attorney general defendants conceded during the hearing held regarding the pending motion to dismiss, this provision does not bind the current attorney general, nor any of his successor attorneys general, to the construction of the statute set forth in the letter. Thus, the attorney general is free to change his mind at any time regarding how the statute is to be construed for purposes of prosecuting potential violators.

The court's conclusion that the attorney general's letter is not a binding interpretation of the statute, but is simply a non-binding statement of his present intent not to prosecute pre-viability abortions under the act, is further reinforced by an additional concession made by the attorney general at the hearing. Specifically, the attorney general acknowledged that the letter would not preclude the state from bringing prosecutions in the future against physicians who had performed pre-viability abortions even while the attorney general's letter was in force. In other words, the attorney general was not only unwilling to state that pre-viability partial-birth abortions performed some time in the future would not be subject to prosecution, but he also refused to rule out the possibility that physicians risked future prosecution for performing abortions that appeared, in view of the opinion letter, to be lawful at the time they were performed. If the opinion letter were in fact a binding

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[12]A second provision of the 1975 Alabama Code, § 36-15-15 (Michie 1991), provides that the attorney general "shall give the district attorneys of the several circuits any opinion, instruction or advice necessary or proper to aid them in the proper discharge of their duties, either by circular or personal letter." The plaintiffs contend that this provision is the actual authority under which the attorney general instructed the district attorneys regarding the interpretation of the partial-birth abortion statute. Whether this contention is correct or not is immaterial for purposes of deciding the mootness question, however, because this provision, like § 36-15-14, does not render the attorney general's construction of the statute binding on him or his successors, who are free to revise or rescind their interpretation at any time.

interpretation of the statute, such prosecutions would not be possible, and physicians could rest assured that performance of pre-viability partial- birth abortion procedures would not subject them to prosecution if performed while the letter is in force.

Under these circumstances, it simply is not "absolutely clear" that the allegedly unconstitutional enforcement of the partial-birth abortion act could not reasonably be expected to take place some time in the future, and the court therefore concludes that the plaintiffs' claims have not been rendered moot by the attorney general's letter. See Concentrated Phosphate, 393 U.S. at 203- 204, 89 S.Ct. at 364.[13]

This conclusion is particularly appropriate in the context of a criminal abortion statute, given the unquestionable political nature of decisions regarding how, when, and against whom to enforce such statutes, as well as the acute sensitivity of these decisions to the force and direction of the prevailing winds of public opinion. In view of these considerations, there is little reason to suspect that the position currently staked out by the state attorney general will not eventually shift, perhaps to one that permits prosecutions to be brought against the plaintiffs who initiated this lawsuit or other physicians who perform similar abortion operations, not only as to future conduct, but even for past conduct that occurred while the present opinion letter was in effect.

This conclusion is not at odds with the decision in Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir.1987),

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[13]The plaintiffs also make much of the fact that the attorney general and the governor have adopted inconsistent positions regarding the appropriate scope of enforcement of the partial-birth abortion act, with Governor James indicating that he intends to enforce it to the fullest possible extent. The court declines to address this argument, however, because it concludes that even in the absence of such a conflict the attorney general's letter constitutes insufficient evidence that the allegedly unconstitutional application of the statute will not be pursued.

where the Eleventh Circuit found that the controversy concerning the defendant city's public display of its seal, which bore the word "Christianity," had been rendered moot by the city's agreement to remove the seal from several prominent locations. The Eleventh Circuit explained its decision by noting that the city had "promised not to display them there in the future," and that there did not appear to be any basis for believing that the city would "break its word." Id. at 693. By contrast, here there is absolutely no indication that the defendants have made any such promises regarding the permanence of the current limitation placed upon prosecutions under the partial-birth abortion act.

Accordingly, the court holds that the plaintiffs have satisfied the requirement imposed by Article III that they present a genuine case or controversy for adjudication by the court. Thus, this court has jurisdiction to hear all of the plaintiffs claims against the defendants. However, before proceeding to the determination of whether the plaintiffs have alleged a claim upon which relief may be granted, the court must determine whether there are sufficient reasons for it to abstain from hearing this lawsuit despite the existence of a jurisdictional basis, as the attorney general defendants contend. The court will address this question of abstention in the following section.

C. Abstention Doctrines

The attorney general defendants argue that this court should abstain from adjudicating the plaintiffs' claims for declaratory and injunctive relief, even though an Article III case or controversy has been presented, on the basis of at least three distinct, but related and somewhat overlapping, doctrines. First, the attorney general defendants seek to invoke the abstention doctrine first articulated in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), which counsels that federal courts should abstain under certain circumstances to avoid interference with state-court proceedings. Second, the attorney general defendants contend that the court should refuse to hear the plaintiffs' claims for equitable relief because they have failed to establish the basic requisites imposed by

courts for the issuance of such relief.[14] Finally, the attorney general defendants rely upon the abstention doctrine most commonly associated with Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), under which federal courts are to refrain from adjudicating constitutional challenges to state action where there are unclear questions of state law that, if resolved by state courts, could obviate the need to decide the constitutional question. The court will address each of these contentions in turn below.

i. Younger Abstention

The first doctrine that the attorney general defendants enlist in their effort to convince the court to abstain from hearing the present lawsuit, which is commonly referred to as Younger abstention,[15] emerged from the Supreme Court's examination of the considerations of equity, comity, and federalism that arise when the federal jurisdiction over a matter could potentially interfere with related state-court proceedings. See Steffel v. Thompson, 415 U.S. 452, 460, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974). Where such interference is a strong possibility, the Supreme Court has commanded federal courts to abstain from hearing the plaintiffs' claims for equitable relief except under "extraordinary circumstances," where the alleged irreparable injury is "both great and immediate." Younger, 401 U.S. at 46, 52, 91 S.Ct. at 751, 755; see also Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972); Ealy v. Littlejohn, 569 F.2d 219, 231 (5th Cir.1978). The attorney general defendants seek to import into this lawsuit these all-but-insurmountable hurdles to the exercise

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[14]Although this equity-based doctrine technically may not be considered an abstention doctrine, the court nevertheless addresses it in this section because the issues raised are closely related to those considered in deciding the Younger and Pullman abstention questions.

[15]Justice Black, writing for the majority in Younger, termed the considerations of comity underlying that decision "Our Federalism." 401 U.S. at 44-45, 91 S.Ct. at 750-51.

of the court's jurisdiction over the plaintiffs' claims, and argue that because the plaintiffs cannot establish that this is an extraordinary case they should be compelled to attempt to vindicate their asserted rights in a state-court proceeding.

The attorney general defendants fail in this effort to smother the plaintiffs' claims for federal declaratory and injunctive relief under the heavy blanket of requirements imposed by the Younger doctrine, however, because they ignore a critical underpinning of the Supreme Court's decision in Younger. Central to that decision was the fact that the Court was presented with a lawsuit in which the sole plaintiff whose claims were reached on the merits sought an injunction to stop a state criminal prosecution that was not merely threatened, but was actually pending against him at the time. The Court held that federal courts should, under ordinary circumstances, refrain from issuing such an injunction against ongoing state criminal proceedings. As the Court explained in Steffel, this holding stemmed from its recognition that such proceedings, "in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the constitution of the United States." 415 U.S. at 460-461, 94 S.Ct. at 1216 (internal quotation marks and citation omitted).

As the Supreme Court has emphasized in its post-Younger decisions, that case and its progeny "were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding." Lake Carriers' Ass'n, 406 U.S. at 509, 92 S.Ct. at 1757. The Court has further explained: "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the

federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." Steffel, 415 U.S. at 462, 94 S.Ct. at 1217.

Thus, where, as here, the plaintiffs do not seek declaratory or injunctive relief against an ongoing state criminal prosecution, the heightened requirements imposed by Younger for the exercise of federal court jurisdiction over the plaintiffs' claims for equitable relief are not triggered. Instead, as the Court explained in Lake Carriers' Ass'n, absent a pending state prosecution, "exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met." 406 U.S. at 509-10, 92 S.Ct. at 1757. The court will address the question of whether the plaintiffs have satisfied these conditions below.

The attorney general defendants also point to Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926), upon which the Supreme Court placed heavy reliance in Younger, in support of their contention that this court should abstain from hearing the plaintiffs' claims.[16] Fenner, unlike Younger, but like the instant dispute, did concern an attempt to obtain federal injunctive relief against a state criminal prosecution prior to its initiation. In expansive language seemingly applicable--and possibly fatal--to this action, the Court noted that:

"Ex parte Young and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary

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[16]In fact, Fenner was the source of the great and immediate' irreparable injury standard adopted by the Court in Younger. See Younger, 401 U.S. at 45, 91 S.Ct. at 751.

circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court."

Fenner, 271 U.S. at 243-44, 46 S.Ct. at 493.

Thus, Fenner appears, at first blush, to mandate that the court exercise its jurisdiction over the plaintiffs' claims here only if the heightened, Younger-type standards are satisfied--that is, if the plaintiffs have presented an "extraordinary case" involving a great and immediate danger of irreparable loss. However, the Supreme Court has explained that Fenner applies "in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution for past conduct." Steffel, 415 U.S. at 463 n. 12, 94 S.Ct. at 1218 n. 12 (emphasis in original). Where the plaintiffs' potential liability under the criminal statute stems from acts that have already occurred, then, the Supreme Court will find, in the ordinary case, that the equity and comity based considerations disfavor the exercise of federal jurisdiction over the plaintiffs' claims for declaratory and injunctive relief. The Steffel Court expressly left open the possibility, however, that claims for equitable relief may be heard by federal courts where, "although no prosecution is pending or impending, an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid arrest." Id. (emphasis in original). Thus, the Supreme Court has concluded that potential criminal liability for prospective, as opposed to past, conduct on the part of the plaintiff does not necessarily implicate the comity and equity-based considerations that counsel application of

the stringent Younger and Fenner standards. The instant dispute, in which the plaintiffs' claims for equitable relief explicitly are grounded on their allegations that they must forgo constitutionally protected activity in order to avoid arrest, falls squarely within the realm of cases for which Steffel left open the possibility of federal-court jurisdiction. Accordingly, the court declines the attorney general defendants' invitation to abstain from hearing this action on the basis of the principles enunciated in Fenner, Younger, and their progeny.

ii. Equity Principles

As stated, once the court determines that the plaintiffs' claims have withstood the test imposed by the Younger abstention doctrine, it must next ascertain, based upon the application of traditional equity principles, whether jurisdiction may be exercised over the plaintiffs' requests for equitable relief. See Lake Carriers' Ass'n, 406 U.S. at 509, 92 S.Ct. at 1757 (in the absence of a pending state criminal prosecution, "exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met"); see also Steffel, 415 U.S. at 462, 94 S.Ct. at 1217; Morales v. Trans World Airlines, Inc., 504 U.S. 374, 380-81, 112 S.Ct. 2031, 2035, 119 L.Ed.2d 157 (1992). Here, the plaintiffs seek both a declaratory judgment that the challenged abortion statutes are unconstitutional, and injunctive relief against the defendants to prohibit them from enforcing the statutes. In view of how the treatment by the Supreme Court of these distinct forms of equitable relief has evolved, the court must address them separately.

The question of whether this court may hear the plaintiffs' claims for declaratory relief is quickly resolved by reference to the Supreme Court's decision in Steffel. As noted above, that case concerned a federal lawsuit challenging a state criminal statute that had been initiated prior to the commencement of any state proceedings against the plaintiff. Observing that the principles of comity, equity, and federalism underlying Younger and its progeny had little force in such a context, and expressly reserving for another day the question of whether federal injunctive relief may be granted, the Court

did hold that federal declaratory relief was available under such circumstances. Steffel, 415 U.S. at 460-475, 94 S.Ct. at 1216-24. To be eligible for declaratory relief, the Court held, a plaintiff must demonstrate that he or she faces a genuine threat of enforcement of the challenged state criminal statute. Id. at 475-76, 94 S.Ct. at 1223-24.

As previously noted, no criminal or civil proceedings in state court have been initiated against the plaintiffs here on the basis of the two disputed abortion statutes, but the plaintiffs have indeed established the existence of a genuine threat of such enforcement. Accordingly, the court concludes that it may exercise jurisdiction over the plaintiffs' claims for declaratory relief in view of Steffel.

Whether the court should also adjudicate the plaintiffs' claims for injunctive relief presents a substantially less straight forward question. Because, as noted, Steffel left this question unanswered, its resolution requires an examination of subsequent Supreme Court decisions.

The former Fifth Circuit Court of Appeals undertook just such an examination in Ealy v. Littlejohn, 569 F.2d 219 (5th Cir.1978).[17] Specifically, the court reviewed two post-Steffel decisions of the Supreme Court, Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), which addressed whether the issuance of a preliminary injunction is barred by the equitable considerations underlying Younger, and Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), which addressed the same question regarding a permanent injunction. The former Fifth Circuit concluded on the basis of these decisions that Younger does not preclude the granting of federal injunctive relief provided the plaintiff can clear the following hurdles: (1) satisfaction of the requirements of federal jurisdiction; (2) demonstration of the existence of "exceptional circumstances"; and (3)

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[17]In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

demonstration that an injunction is necessary for the adequate protection of the plaintiff's constitutional rights. The Supreme Court has explained the fact that plaintiffs seeking injunctive, as opposed to declaratory, relief must overcome these additional barriers as follows: "although [o]rdinarily ... the practical effect of injunctive and declaratory relief will be virtually identical, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." Wooley, 430 U.S. at 711, 97 S.Ct. at 1433-34 (internal quotation marks and citations omitted).[18]

Because this court has already determined that the plaintiffs here have satisfied all other federal jurisdictional requirements for their claims for permanent injunctive relief, only the second and third showings described in Ealy remain at issue. While the intended meaning of "exceptional circumstances," as employed in the second requirement, is far from crystal clear, it does appear to erect a rather high barrier to the issuance of federal injunctive relief.[19] For

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[18]In Doran, the Supreme Court held that preliminary, as opposed to permanent, injunctive relief may be awarded even absent satisfaction of the stringent Younger standards. 422 U.S. at 930, 95 S.Ct. at 2567.

[19]The relationship, in terms of relative stringency, of the 'exceptional circumstances' benchmark applicable here, and the 'extraordinary circumstances' standard enunciated in Fenner and Younger, is all but impossible to ascertain. The court does note, however, that Wooley derived the 'exceptional circumstances' formula from Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935), one of the decisions that the Court cited in Younger to justify its adoption of the 'extraordinary circumstances' standard it established for cases involving pending state prosecutions. See Younger, 401 U.S. at 45-46, 91 S.Ct. at 751. Thus, it is difficult to conclude that the two standards are anything but equivalent. If this is true, then Younger is far from moribund in the context of pre- enforcement challenges to state criminal statutes, where injunctive, rather than mere declaratory, relief is sought. The Court in Wooley appeared to say as much, when it

instance, in Wooley, the Court found that three successive prosecutions of the plaintiff in five weeks, with the threat of repeated prosecutions in the future against both him and his wife, satisfied this requirement and justified federal injunctive relief. 430 U.S. at 712, 97 S.Ct. at 1434. The Court intimated that a single threatened prosecution, absent earlier proceedings brought against the plaintiffs under the same disputed statute, will not constitute "extraordinary circumstances," stating that the scenario presented in Wooley "is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time." Id.; see Spencer v. Honorable Justices of Supreme Court of Pa., 579 F.Supp. 880, 892-93 (E.D.Pa.1984) (finding no exceptional circumstances because plaintiff faced only his first threat of prosecution under the challenged provision of the Pennsylvania Code of Professional Responsibility), aff'd, 760 F.2d 261 (3d Cir.1985) (table).

Because there is no prior record of prosecutions brought against any of the plaintiffs under the two challenged Alabama abortion statutes, and in view of the fact that the court sees no reason to question the soundness here of the Supreme Court's observation that a federal plaintiff's interest can be protected by issuance of a declaratory judgment alone, the court concludes that the requisite "exceptional circumstances" are not present. Accordingly, the court will refrain from hearing the plaintiffs' claims for injunctive relief, but will exercise jurisdiction over this lawsuit only to the extent that the plaintiffs seek a declaratory judgment that the two abortion statutes are unconstitutional.[20]

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noted that "generally a court will not enjoin the enforcement of a criminal statute even though unconstitutional, since such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of Younger." 430 U.S. at 711-12, 97 S.Ct. at 1434 (citations and internal quotation marks omitted).

[20]The court recognizes that the question of whether to abstain from hearing the plaintiffs' claims for injunctive relief and the question of whether such relief should be granted are distinct, and that the latter inquiry requires that the court reach the merits

iii. Pullman Abstention

In their final effort to convince the court to abstain from hearing the plaintiffs' claims, the attorney general defendants invoke the Pullman doctrine, which counsels abstention if "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). The Supreme Court has cautioned that such abstention is to be exercised "only in narrowly limited 'special circumstances' where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." Kusper v. Pontikes, 414 U.S. 51, 54, 94 S.Ct. 303, 306, 38 L.Ed.2d 260 (1973); see also Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306, 99 S.Ct. 2301, 2312-13, 60 L.Ed.2d 895 (1979) (such abstention "may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.' ") (quoting Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965)).

Thus, two requirements must be met for Pullman abstention to apply: (1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised. Palmer v. Jackson, 617 F.2d 424, 428 (5th Cir.1980); see also High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir.1980) (noting that the court should also consider "whether a federal decision could later conflict with subsequent state court resolutions

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of the plaintiffs' claims. See Lake Carriers' Ass'n, 406 U.S. at 509 n. 13, 92 S.Ct. at 1756 n. 13 (noting that the two inquiries are distinct); see also Polykoff v. Collins, 816 F.2d 1326, 1333 (9th Cir.1987). However, because the court has concluded that, under the pertinent Supreme Court and former Fifth Circuit authorities, the plaintiffs' have failed to overcome the threshold abstention impediments to exercise of the court's jurisdiction over their claims for injunctive relief, the merits of these claims need not be reached.

concerning the same regulatory program or scheme, thus engendering more confusion"). It is important to note, however, that abstention is not to be applied merely to permit the state courts to adjudicate the constitutionality of the state statute on the basis of federal constitutional law. Duke v. James, 713 F.2d 1506, 1510 (11th Cir.1983).

Here the plaintiffs contend, among other things, that the challenged abortion statutes are unconstitutionally vague.[21] This, of course, raises a question of unclear state law, and thus militates in favor of abstention by this court to permit the Alabama courts to clarify the meaning of the statutes. However, as is characteristic of all the abstention doctrines addressed here, the analysis is not so straightforward, for "not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention." Procunier v. Martinez, 416 U.S. 396, 401, 94 S.Ct. 1800, 1805, 40 L.Ed.2d 224 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

As the Court explained in Procunier, two kinds of vagueness attacks must be distinguished for purposes of determining whether Pullman abstention is appropriate. "Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. [Baggett v. Bullitt, 377 U.S. 360, 376-77, 84 S.Ct. 1316, 1325-26, 12 L.Ed.2d 377 (1964)]. Abstention is therefore appropriate." Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805- 06 n. 5. However, "[w]here ... the statute or regulation is challenged as vague because individuals to whom it plainly apples simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague

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[21]The plaintiffs' other challenges to the constitutionality of the two abortion statutes do not implicate the concerns underlying the Pullman doctrine, because they simply question whether application of the disputed, but clear and unambiguous, provisions would violate the constitution.

terms, abstention is not required. [Baggett, 377 U.S.] at 378, 84 S.Ct. at 1326. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require 'extensive adjudications, under the impact of a variety of factual situations,' to bring the challenged statute or regulation 'within the bounds of permissible constitutional certainty.' Ibid." Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805-06 n. 5.

Here, the plaintiffs level six separate vagueness challenges against the two abortion statutes. With respect to the partial-birth abortion statute, the plaintiffs contend the following: (1) that the definition of a partial-birth abortion provided in the statute, as one "in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," is unconstitutionally vague as to which types of abortion procedures it describes; and (2) that this definition is also unconstitutionally vague as to what is meant by a "living fetus." With respect to the post-viability abortion statute, the plaintiffs make the following vagueness allegations: (1) that the statute is unconstitutionally vague because its exception for cases in which abortions are medically necessary imposes both "objective" and "subjective" standards on physicians' determination of medical necessity; (2) that the statute is unconstitutionally vague because physicians' determinations of whether a medical emergency prevents compliance with several procedural requirements are also governed by a dual "objective" and "subjective" standard; (3) that the statute is also unconstitutionally vague because it employs both "objective" and "subjective" standards for determining whether a fetus is viable; and (4) that the statute is also unconstitutionally vague in mandating viability testing after "19 weeks of pregnancy" without providing a clear and unambiguous methodology for measuring fetal age.[22]

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[22]Although the precise nature of this fourth challenge to the post- viability abortion statute is unclear, it appears to be premised on the inclusion in the post-viability abortion statute of at least two methodologies for calculating fetal age for purposes of determining when viability testing is required under § 26-22-4,

First, regarding the two vagueness challenges against the partial-birth abortion statute and the fourth vagueness challenge to the post-viability abortion statute, the court concludes that the interpretive issues, which underlie the challenges, should be certified to the Alabama Supreme Court pursuant to Rule 18 of the Alabama Rules of Appellate Procedure,[23] with the result that the need for abstention, or

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which mandates such testing prior to performing an abortion after the woman's "first 19 weeks of pregnancy." Specifically, the plaintiffs point to the allegedly contradictory benchmarks provided in § 26-22-2(3), which defines "Gestational age" as "The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman," and in § 26-22-2(7), which defines "Pregnant" as a condition that "commences with fertilization." According to the plaintiffs, these distinct measurements may differ by as many as two weeks. Apparently because the terms "pregnancy" and "gestation" are roughly synonymous, see Webster's Third New International Dictionary 952, 1788 (1976) (defining the two terms as synonyms), the plaintiffs contend that either of these two possible measurements of fetal age may reasonably be employed for purposes of § 26-22-4, which refers to "pregnancy" without explicitly stating when this condition commences, but that the statute fails to specify which is to be used.

In addition, to further complicate matters, it appears that this fourth challenge to the post-viability abortion statute is not actually alleged in the plaintiffs' complaint. Although the defendants have not taken issue with this omission, the plaintiffs should still amend their complaint, within 14 days, to state this challenge in clear terms.

[23]Rule 18 of the Alabama Rules of Appellate Procedure provides, in pertinent part, as follows:

"When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the

more appropriately, deferral, under the Pullman doctrine is pretermitted.[24] Were the Alabama Supreme Court to construe the term "living" to refer to a "viable" fetus, the constitutional questions raised by the plaintiffs' claims would differ substantially from those that would arise if "living" were defined as containing any living tissue or cells, and either interpretation would clarify the nature of the proscribed conduct. Indeed, at the hearing on the defendants' motions, the plaintiffs conceded that such a construction would moot this part of their vagueness challenges. Similar clarification would result from a declaration by the State Supreme Court as to which specific abortion techniques (e.g., traditional and intact dilation and evacuation, etc.) are proscribed by the act because the physician performs the abortion by "partially vaginally deliver[ing] a living fetus before killing the fetus and completing the delivery," as specified in § 26-23-2(3) of the statute. Finally, with regard to the plaintiffs' fourth challenge to the post-viability abortion statute, which mandates a viability test where the woman is past "her first 19 weeks of pregnancy," should the Alabama Supreme Court determine that the requisite measurement of fetal age commences with fertilization under the statutory scheme, and not the first day of the woman's lmp, the statute would be sufficiently clarified to extinguish another of the plaintiffs'

Supreme Court of this State, by written opinion, may answer."

Pursuant to this provision, federal district courts may certify questions to the Alabama Supreme Court. See, e.g., Tectonics, Inc. v. Castle Const. Co., 496 So.2d 704 (Ala.1986) (Alabama Supreme Court answers question certified by this court).

[24]In Growe v. Emison, 507 U.S. 25, 32 n. 1, 113 S.Ct. 1075, 1080 n. 1, 122 L.Ed.2d 388 (1993), the Supreme Court wrote: "To bring out more clearly ... the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of Pullman 'deferral.' Pullman deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute....". Certification to the Alabama Supreme Court of these questions is tantamount to Pullman deferral of the claims in which the questions are presented.

vagueness claims. By pursuing this course of action, the court heeds the counsel of the unanimous Supreme Court in Arizonans for Official English v. Arizona, --- U.S. ----, ----, 117 S.Ct. 1055, 1072-73, 137 L.Ed.2d 170 (1997), where the Court observed that certification to the state's highest court will succeed in "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."

However, the court concludes that it should neither certify to the Alabama Supreme Court, nor abstain from hearing, under Baggett and Procunier, the plaintiffs' vagueness challenges against the post-viability abortion statute that are premised on the alleged imposition of mixed subjective and objective standards on physicians' conduct (challenges (1) through (3) above). These challenges are not directed to provisions that are susceptible to a reasonable limiting construction by the Alabama courts that would obviate or substantially modify this court's adjudication of the constitutionality of the disputed provisions. Instead, as was the case in Procunier, these provisions are challenged as vague because individuals to whom they plainly apply--physicians who perform abortions on potentially viable fetuses--cannot understand with certainty the nature of the proscribed conduct, and they do not intend to forswear all constitutionally-protected activity arguably within the scope of the vague terms. See Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805 n. 5. Moreover, given the complexity of the alleged infirmities in the challenged provisions, and the myriad potential factual settings in which problems of vague application of the statute may arise, the court finds, as was also true in Procunier, that no single adjudication by a state court could eliminate the constitutional difficulty, but rather that "extensive adjudications, under the impact of a variety of factual situations" would be required to draw the statute "within the bounds of permissible constitutional certainty." See id. The accuracy of this observation is confirmed below when the court grapples with the question of whether these vagueness challenges state a claim upon which relief may be granted.

For the foregoing reasons, the court finds that it has jurisdiction to hear all of the plaintiffs' claims, to the extent

that they seek declaratory, as opposed to injunctive, relief. The court will, however, refrain from hearing the three vagueness challenges described above until the Alabama Supreme Court has an opportunity to construe the pertinent provisions of the challenged acts, pursuant to the questions certified by this court.[25]

Accordingly, in the remaining sections of this memorandum opinion the court will address the question of whether dismissal of the lawsuit is required because, as the defendants contend, the plaintiffs have failed to state any claim upon which relief may be granted.

V.ATTORNEY GENERAL DEFENDANTS' CONTENTIONS THAT PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

As stated, in considering a defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the court accepts the plaintiff's factual allegations as true, and the action may not be dismissed unless it appears to a certainty that the plaintiff can offer no set of facts supporting the relief requested.

The attorney general defendants attack the following vagueness allegations made by the plaintiffs as failing to state a claim upon which relief can be granted: (1) that the partial-birth abortion statute is unconstitutionally vague as to which abortion procedures fall within its definition of a "partial- birth" abortion; (2) that the partial-birth abortion statute is unconstitutionally vague as to what is meant by the term "living fetus;" and (3) that the post-viability abortion statute is unconstitutionally vague as to how physicians are to determine (a) whether a fetus is viable, (b) whether an abortion is necessary to prevent the death of the woman or the substantial and irreversible impairment of her health, (c) whether a medical emergency prevents compliance with the statute's procedural requirements for conducting and documenting the abortion, and (d) whether the abortion takes

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[25]See supra note 24.

place after "19 weeks of pregnancy," for purposes of ascertaining whether viability testing is required. With the exception of allegations (1), (2) and (3)(d), the determination of which will be postponed pending the Alabama Supreme Court's interpretation of the pertinent statutory provisions, the court will address whether the plaintiffs have succeeded in stating a claim regarding each of these allegations.

In addition to the foregoing vagueness challenges, the attorney general defendants also contend that the following allegations fail to state a claim: (1) that the partial-birth abortion statute unconstitutionally imposes an undue burden on women seeking pre-viability abortions, to the extent that it prohibits the most common and safest abortion procedures, and to the extent that it imposes a substantial obstacle on women's choice of abortion method; (2) that the partial-birth abortion statute is unconstitutional even if limited to post-viability abortions because it lacks any exception for preserving maternal health; (3) that the partial-birth abortion statute is unconstitutional because its civil liability provisions impose an undue burden on women seeking pre-viability abortions; and (4) that the post-viability abortion statute is unconstitutional because it impermissibly forces a "trade- off" between the woman's health and fetal survival, and fails to ensure that maternal health remains the physician's paramount concern.[26] The court will address whether each of these allegations survives the attorney general defendants' motion to dismiss as well.

A. Alleged Vagueness of the Post-Viability Abortion Statute

i. Legal Standard for Determining Vagueness

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[26]The attorney general defendants apparently do not contend that the plaintiffs have failed to state claims upon which relief may be granted as to the following two allegations in the complaint: (1) that both statutes violate the equal protection clause, and (2) that the partial-birth abortion statute interferes with a woman's right to determine the course of her medical treatment, and therefore violates her right to bodily integrity. Consequently, these claims are not addressed in this memorandum opinion.

The plaintiffs correctly observe that the due process clause of the fourteenth amendment has been construed to prohibit laws sufficiently vague that "persons of common intelligence must necessarily guess at [the laws'] meaning and differ as to [the laws'] application." Smith v. Goguen, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 1247 n. 8, 39 L.Ed.2d 605 (1974). Thus, a vague law is unconstitutionally flawed both because it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and because the law's lack of explicit instructions to those who enforce it "impermissibly delegate[s] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); see also High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228-29 (11th Cir.1982).

Moreover, the peril inherent in a vague statute is amplified where, as is alleged here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (invalidating a state abortion statute on vagueness grounds). These concerns are especially significant where those who run afoul of the statute face criminal penalties. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. Hoffman Estates. Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

The attorney general defendants do not contest the applicability of the foregoing principles to the instant dispute. However, the parties part company over the requisite showing that challengers of a statute must make to establish unconstitutional vagueness. The plaintiffs, relying upon the Supreme Court's decisions in Kolender v. Lawson, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983), and Colautti, argue that where the disputed law criminalizes constitutionally protected conduct it should be held vague on its face "even when it could conceivably have had some valid application." The attorney general defendants disagree that this relatively permissive standard governs the inquiry, and instead urge the court to adopt the significantly more

restrictive standard articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), and applied to the abortion context in Webster v. Reproductive Health Servs., 492 U.S. 490, 524, 109 S.Ct. 3040, 3060, 106 L.Ed.2d 410 (1989) (O'Connor, J., concurring), which requires that the plaintiff establish "that no set of circumstances exists under which the Act would be valid." Thus, the attorney general defendants urge the court to dismiss the plaintiffs' vagueness challenges unless they have alleged facts demonstrating that the disputed statute would be vague in all its possible applications.

The court does recognize that substantial disagreement exists among the Federal Courts of Appeals regarding whether the Salerno benchmark for facial challenges to the constitutionality of statutes still governs the analysis in the abortion context in the wake of Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).[27] In fact, the court will be called upon to examine this very issue in addressing the plaintiffs' contentions that the partial-birth abortion statute imposes an undue burden on pregnant women who seek an abortion, and that the post-viability abortion statute imposes an unconstitutional "trade-off" between maternal health and fetal survival. However, the court sees no reason why Salerno should play any role in a facial challenge to an allegedly "vague" act, as opposed to similar attacks grounded upon an act's alleged "overbreadth."[28] In Salerno itself, the Supreme

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[27]The attorney general defendants correctly characterize the plaintiffs' vagueness claims as "facial," as opposed to as applied, because the plaintiffs allege that the statutes are vague on their very face (that is, as written they would not be clear to the reader), rather than as specifically applied to their conduct. See Posters 'N' Things, Ltd. v. U.S., 511 U.S. 513, 525, 114 S.Ct. 1747, 1754, 128 L.Ed.2d 539 (1994) (addressing allegation of vagueness as applied to a criminal defendant); see also Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 193-94 (6th Cir.1997) (discussing the distinction between facial and as-applied challenges generally).

[28]In facial challenges to the alleged overbreadth of a statute,

Court indicated that the restrictive standard was specifically directed to facial challenges in which problems of "overbreadth" were alleged: "The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745, 107 S.Ct. at 2100. See also Evans v. Kelley, 977 F.Supp. 1283, 1309 n. 27 (E.D.Mich.1997) (rejecting, in the context of a challenge to an abortion statute, an argument that the Salerno standard applies to "void-for- vagueness" claims).

Moreover, the court notes that, while the Supreme Court has on occasion stated that, in most circumstances, to succeed on a facial void-for- vagueness challenge "the complainant must demonstrate that the law is impermissibly vague in all its applications," it has also recognized that "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement depends in part on the nature of the enactment." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-98, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In fact, the Court has opined that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Id. at 499, 102 S.Ct. at 1193. These principles are of course consistent with the Court's teaching in Kolender and Colautti that a criminal statute

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which most frequently arise in the free speech context, the plaintiff contends that the enactment, even if it permissibly regulates certain conduct, "sweeps too broadly, penalizing a substantial amount" of constitutionally- protected conduct. Forsyth County v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992); see also Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The vagueness challenges at issue here, however, are distinct from such claims of unconstitutional overbreadth, although overbreadth implications may be drawn from allegations in the complaint that the partial-birth abortion statute may be construed to prohibit certain well- established types of abortion procedures performed by the plaintiffs and other abortion-providers.

impinging upon constitutionally-protected conduct should be held vague on its face even when it could conceivably have had some valid application.

Accordingly, the court will apply the less restrictive Kolender/Colautti standard in addressing all of the plaintiffs' vagueness attacks on the post- viability statute, and endeavor to ascertain whether the plaintiffs have alleged facts suggesting that the statute fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108, 92 S.Ct. at 2298-99. If this standard is satisfied, the court will find that the plaintiffs have stated a claim upon which relief may be granted, even if the defendants succeed in establishing that the statute could conceivably have had some valid application.

ii. Application of the Legal Standard to the Plaintiffs' Vagueness Challenges

As stated, the plaintiffs allege that Alabama's post-viability statute is unconstitutionally vague with respect to four separate determinations that it requires physicians to make: (1) the determination as to fetal viability; (2) the determination as to the medical necessity of an abortion to prevent the woman's death or substantial and permanent impairment of her health; (3) the determination as to whether a medical emergency prevents compliance with the statute's procedural requirements; and (4) the determination as to fetal age, for purposes of whether viability testing is required. The court will address the first three of these challenges below, but, as discussed above, will postpone its examination of the fourth claim until after the Alabama Supreme Court has had an opportunity to construe the pertinent provisions of the statute in response to the certified questions from this court.

(a) Vagueness as to Determination of Fetal Viability

The plaintiffs contend that the post-viability abortion statute is unconstitutionally vague in view of the Supreme Court's decision in Colautti, because it imposes both "objective" and "subjective" standards on the requisite

determination of fetal viability. In Colautti, the challenged abortion statute contained a provision that prescribed a standard of care where the person performing an abortion determined that the fetus is viable, or where "there is sufficient reason to believe that the fetus may be viable." 439 U.S. at 391, 99 S.Ct. at 683. The Court found this requirement to be vague and ambiguous in part because it was unclear whether the statute imposed a purely subjective standard, or one that was mixed subjective and objective. The Court concluded that because the determination that the fetus "is viable" was to be based upon the attending physicians' "experience, judgment or professional competence," it was governed by a subjective standard, but it could not ascertain whether the "sufficient reason to believe that the fetus may be viable" language was also to be gauged on a subjective standard, or whether an objective standard was imposed. Id. at 391, 99 S.Ct. at 683.

Relying heavily on Colautti, the plaintiffs here attempt to convince the court that the Alabama post-viability abortion statute is constitutionally infirm because it also employs a vague standard for judging physician conduct. The plaintiffs first point to § 26-22-3 of the act, which forbids abortions "when the unborn child is viable," but recognizes an exception to this proscription where the physician "reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable." 1975 Ala.Code § 26-22-3(a) & (b)(2) (Law.Co- op.Supp.1997) (emphasis added). The plaintiffs contend that the "reasonably believes" language imposes both an objective and a subjective standard on physicians. The plaintiffs next direct the court's attention to § 26-22-4 of the act, governing viability testing, which mandates that the physician "determine whether, in his or her good faith medical judgment, the [unborn] child is viable." This provision, according to the plaintiffs, imposes a subjective standard, because the physician is to exercise his or her "good faith" judgment in assessing whether the fetus has reached viability. In light of these two provisions, the plaintiffs argue, the statute imposes a mixed subjective and objective benchmark for judging physicians' conduct regarding the viability determination, and thus it contravenes

the Court's standard set forth in Colautti.

As explained more fully below, the plaintiffs are correct in characterizing the foregoing provisions as imposing a mixed subjective- objective standard on physicians, determinations of fetal viability. However, they misconstrue Colautti when they contend that such a mixed standard is necessarily vague in view of that decision. As discussed above, the provision examined in Colautti was deemed vague because it was impossible to determine the overall standard that governed the determination of fetal viability; that is, the Court could not ascertain whether the statute imposed a purely subjective standard, or one that was both subjective and objective. By no means did the Court indicate that the challenged statute was unconstitutionally vague merely because it imposed a mixed subjective-objective standard. In fact, there is nothing in Colautti to suggest that such a mixed standard, if couched in clear terms, is per se vague, as the plaintiffs appear to contend.

Although it declines to read Colautti as urged by the plaintiffs, the court does agree with their assertion that the Alabama post-viability abortion statute employs a mixed subjective-objective standard to gauge physicians' determination of fetal viability. Inclusion of the term "reasonably" as a modifier of "believes" in § 26-22-3(b)(2) renders the applicable standard both subjective and objective in nature. That is, the test gauges the objective correctness of the physician's subjective understanding of the outcome of the viability determination. Thus, it is clear that the statute imposes a mixed subjective-objective standard on the viability determination: only if the physician believes that the fetus is not viable, and that subjective belief is found to be objectively reasonable, does he or she satisfy the requirements under the statute for performing a post-viability abortion. [29]

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[29]Moreover, the plaintiffs' reference to § 26-22-4 of the statute, which also pertains to the physician's determination of fetal viability, bolsters this conclusion. The court agrees with the plaintiffs that this provision imposes a subjective standard on the physician by requiring that he or she exercise "good faith medical

This conclusion is consistent with the recent decision in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir.1997), in which the Sixth Circuit struck down three major portions of an Ohio act that proscribed and regulated both partial-birth and post-viability abortions. The Voinovich court characterized two provisions in the portion of the statute directed to post-viability abortions as imposing a "dual" subjective-and- objective standard because they called for the physician to make certain determinations "in good faith and in the exercise of reasonable medical judgment" 130 F.3d at 204. The court described these provisions as containing "subjective and objective elements in that a physician must believe that the abortion is necessary and his belief must be objectively reasonable to other physicians." Id.

As discussed above, the court does not agree that Colautti may be read to compel a finding that the mixed standard imposed on physicians by the Alabama post-viability abortion statute is per se unconstitutionally vague. However, because the court agrees with the plaintiffs that the post-viability abortion statute's fetal viability testing requirement imposes a mixed subjective- objective standard on physicians, the analysis is not yet complete. Instead, the court must revisit the Colautti decision to ascertain whether the concerns expressed by the Supreme Court regarding the perils inherent in an objective standard for judging physician's decisions in the abortion context are implicated by the inclusion of an objective component in the Alabama statute's governing standard. Specifically, the question remains whether that objective component renders the act unconstitutionally vague by failing to provide adequate notice to physicians as to when their activities fall within the statute's proscription.

As explained above, the viability-determination provisions challenged in Colautti were held to be unconstitutionally vague because of the uncertainty regarding whether they employed a purely subjective or a mixed

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judgment," and therefore that the physician must subjectively believe that the fetus is not viable.

subjective- objective standard. However, the Court also emphasized that adjudging physician conduct under any standard having an objective component is a perilous enterprise, explaining that such a standard, applied "from the perspective of a cross section of the medical community or a panel of experts ..., obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center." Colautti, 439 U.S. at 391-92, 99 S.Ct. at 684. Additionally, the Court faulted the challenged statute, including the objective component of the standard applied to physicians, for failing to "afford broad discretion to the physician," noting that "Instead, it condition[ed] potential criminal liability on confusing and ambiguous criteria. It therefore present[ed] serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." Id. at 394, 99 S.Ct. at 685.[30]

The court agrees with the plaintiffs that these observations by the Supreme Court strongly suggest that the inclusion of an objective element in the viability-determination provisions of the post-viability abortion statute may render the statute unconstitutionally vague because they could impermissibly stifle physicians' discretion and chill the exercise of constitutional rights. The attorney general defendants counter, however, that any vagueness concerns regarding objective standards expressed by the Court in Colautti are vitiated here because the challenged provisions of the Alabama statute include a mens rea requirement for a finding of liability.[31] In support of this contention, the attorney

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[30]The court recognizes that the Supreme Court reached this conclusion in large part because the nature of the standard applied (purely subjective versus mixed subjective objective) could not be determined with certainty. However, it is also clear that the imposition of an objective test to gauge physician's professional conduct contributed to some degree to this conclusion. See Colautti, 439 U.S. at 391-93, 99 S.Ct. at 683-84.

[31]Inclusion of a mens rea requirement means that the

general defendants cite Colautti itself, as well as earlier Supreme Court decisions holding that mens rea requirements can cure otherwise vague statutes. This argument appears to raise an issue of first impression for the courts: to date, no court has specifically addressed whether an objective component in a standard for judging physician conduct in the abortion arena is constitutional where liability is conditioned on a finding that the physician had the requisite mens rea.[32]

The attorney general defendants are correct to observe that Alabama's post- viability abortion statute conditions liability on a finding that the accused physician satisfies a mens rea requirement. Specifically, the statute provides in § 26-22-3(a) that "no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable."[33] Thus, a physician faces criminal liability

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defendant must have the requisite "guilty mind" or "criminal intent" in order to be convicted under a statute. See Black's Law Dictionary 889 (5th ed.1979) (also defining "mens rea" as "guilty knowledge and willfulness"). The related term "scienter" means "knowingly," and is also frequently used to signify the defendant's "guilty knowledge." See id. at 1207. The court employs these two terms interchangeably in this order.

[32]In Colautti, as explained more fully below, the Court did not specifically address whether a scienter requirement would adequately allay its fears concerning an objective standard for judging physician conduct. See Colautti, 439 U.S. at 396, 99 S.Ct. at 686. Nor did the Sixth Circuit reach this question in Voinovich. See 130 F.3d at 205.

[33]Section 13A-2-2(3) of the Alabama Code defines criminal recklessness as follows:

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation."

under the statute only when he or she intends to perform an abortion involving a viable fetus, knows that he or she is performing such an abortion, or is aware of and consciously disregards the risk that a fetus to be aborted is viable.[34]

The attorney general defendants are also correct to point out that the Court in Colautti expressly stated that the absence of any scienter requirement in the viability-determination provision at issue in that case contributed to the holding that the challenged statute was unconstitutionally vague. See Colautti, 439 U.S. at 397, 99 S.Ct. at 685-86. However, it must be noted that the Colautti Court did not invalidate the disputed statute exclusively on the basis of the absent scienter requirement, but instead merely observed that the vagueness of the statute was "compounded by" its imposition of strict liability. See id. at 394, 99 S.Ct. at 685. In fact, the Court expressly declined to decide whether the statute would have been constitutional had it incorporated such a requirement. See id. at 396, 99 S.Ct. at 686. Nor did the Court state that an otherwise unconstitutionally-vague statute could be saved by an appropriately-drafted scienter requirement. Thus, only by unreasonably over-extending Colautti's holding could one read that decision to require that the Alabama partial-birth abortion statute be found constitutional despite the plaintiffs' vagueness allegations, solely because the statute conditions guilt on a finding of mens rea.

However, despite the fact that Colautti does not compel a holding that the scienter requirement cures any

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1975 Ala.Code. § 13A-2-2(3) (Michie 1994).

[34]Although one could argue that § 26-22-3(a) of the post-viability abortion statute only conditions liability on a finding that the physician had the requisite mens rea regarding the fact that he or she was performing an abortion, and not regarding the viability status of the fetus, the court finds that such an interpretation would effectively drain the scienter requirement of all real meaning, and thus concludes that it is with respect to whether the aborted fetus is viable that the requirement applies.

vagueness in the viability- determination provision at issue here, the court must nonetheless examine the statute to determine whether in view of the Colautti Court's reasoning the requirement would in fact cure the alleged vagueness. As the Colautti Court noted, the Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." 439 U.S. at 395, 99 S.Ct. at 685. The Court has indeed observed that otherwise vague statutes may pass constitutional muster where the legislature has thought to limit liability to situations in which the accused has the requisite mens rea. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); see also Fargo Women's Health Org., v. Schafer, 18 F.3d 526, 534-35 (8th Cir.1994) (court's rejection, in light of Hoffman Estates and Colautti, of a vagueness challenge to an abortion statute based in part upon the existence of a general scienter requirement that the court determined must be imported into the challenged statute); Evans v. Kelley, 977 F.Supp. 1283, 1305-06, 1308-09, 1311 n. 29, & 1319 n. 38 (E.D.Mich.1997) (holding that the absence of any scienter element in a partial-birth abortion statute similar to that at issue here exacerbated the vagueness of the definition of the proscribed procedure).

The rationale underlying these decisions was articulated by the Supreme Court in a seminal decision, Screws v. United States, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945), as follows:

"[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.... The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Similarly, in Boyce Motor Lines v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 331-32, 96 L.Ed. 367 (1952), the Court relied upon this rationale to uphold a statute that conditioned liability on a finding that the accused "knowingly" violated the challenged regulation concerning the transportation of hazardous materials. Once again, the Court emphasized that any alleged vagueness in the prohibition was cured by the inclusion of "culpable intent" as a necessary element in the offense, such that a conviction would only be proper where the violator at the very least "willfully neglected to exercise its duty" under the regulation. id. (emphasis added). Thus, these decisions establish that where an element of bad faith on the part of the accused is required for conviction under an allegedly vague criminal statute, the Supreme Court is loathe to invalidate the statute as vague for failing to provide adequate notice of the proscribed conduct.

The court recognizes that the foregoing decisions concerned statutes that conditioned guilt on a finding that the accused acted with intent or knowledge in violating the pertinent criminal enactment. Under Alabama's post- viability abortion statute, however, a physician need not intentionally or knowingly perform an abortion on a viable fetus to be convicted; instead, pursuant to § 26-22-3(a) of the statute, the lowest level of culpability for which liability may lie is recklessness on the part of the physician. The Supreme Court apparently has not addressed the question of whether a requirement that the accused have a mental state of recklessness, rather than specific intent or knowledge, can cure an otherwise vague statutory standard.

However, at least one appellate court has answered this question in the affirmative. See Einaugler v. Supreme Court, 109 F.3d 836, 842 (2d Cir.1997). In Einaugler, the Second Circuit rejected a habeas corpus petitioner's claim that he was convicted under an unconstitutionally vague statute because, among other reasons, the provisions at issue included a scienter requirement. Specifically, the petitioner, a physician, was convicted under a "reckless endangerment" statute that required proof that he had "recklessly engaged in conduct that created a substantial risk of serious physical injury," and for his behavior to be adjudged reckless, he must

have "grossly deviated from a reasonable person's standard of conduct and consciously disregarded a substantial and unjustifiable risk."[35] See id. at 840. The Second Circuit, citing Hoffman Estates and Colautti, held that the requirement that the petitioner's actions be reckless would mitigate any alleged vagueness in the criminal statute, and noted that he was not "punished under the statute for exercising reasonable medical judgment erroneously," but rather that conviction required "that he was aware that the patient required a course of treatment that he did not provide." Id.

This court agrees with the Einaugler court's conclusion that a scienter requirement of recklessness can, in view of the Supreme Court's jurisprudence on the relationship between mens rea and vagueness, cure an otherwise vague criminal enactment. Here, as was the case in Einaugler, a physician evades punishment under the post-viability abortion statute unless he was aware of, and consciously ignored, a substantial risk that certain circumstances existed. In other words, a physician would not be held strictly liable under the statute merely for erroneously exercising his or her medical judgment; rather, a finding that the physician consciously disregarded a subjectively-known risk that the fetus was viable at the time of the abortion would be necessary to sustain a conviction.

Furthermore, the court holds that the concerns voiced by the Supreme Court in Colautti regarding the hazards imposed by an objective test of physician conduct are largely allayed by the presence of the scienter requirement in the Alabama post-viability abortion statute. Specifically, the Court's overriding concern that such a standard may function as "a trap for those who act in good faith" is obviated by the fact that a conviction under the statute for an erroneous

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[35]Similarly, as stated above, under Alabama's criminal code a person acts recklessly when he or she "is aware of and consciously disregards a substantial and unjustifiable risk ... of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." 1975 Ala.Code § 13A2-2(3) (Michie 1994).

determination of viability requires a measure of bad faith on the physician's part: he or she must know that a substantial and unjustifiable risk exists that the fetus is viable, and must consciously disregard that known risk. Mere good faith, but mistaken, exercise of professional medical judgment would not support a conviction under the statute, and thus the "chilling effect" decried in Colautti is not a legitimate concern here.

Thus, because the court concludes that any alleged vagueness in the post-viability abortion statute's viability determination provisions would be vitiated by the statute's mens rea requirement, the plaintiffs have failed to state a claim upon which relief may be granted concerning the alleged vagueness of these provisions.

(b) Vagueness as to Determination of Necessity to Prevent Woman's Death or Impairment

The plaintiffs also challenge the post-viability abortion statute on the basis of the alleged vagueness of the test it prescribes for physicians to determine whether an otherwise prohibited abortion must be performed to prevent the woman's death or the substantial and irreversible impairment of her health. Specifically, the plaintiffs allege that two provisions of the act pertaining to this determination, like the provisions governing fetal viability discussed above, employ inconsistent objective and subjective standards. The first of these provisions is found in § 26-22-3(b)(1) of the statute, which permits post-viability abortions if the physician performing the abortion "reasonably believes that it is necessary to prevent either the death ... or the substantial and irreversible impairment of a major bodily function of the woman." The plaintiffs allege that use of the term "reasonably believes" in this provision imposes both objective and subjective standards for gauging the physician's determination of medical emergency. The plaintiffs also point to the definition of the term "medical emergency" provided in § 26-22-2(6) of the statute, which reads as follows: "The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death

or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." The reference to "good-faith clinical judgment" in this definition, the plaintiffs allege, imposes a subjective standard regarding the physician's determination that a medical emergency exists.

The court agrees with the plaintiffs' contention. The statute does indeed set forth a mixed subjective-objective in § 26-22-3(b)(1) when it states that the physician must "reasonably believe[ ]" that the abortion is necessary, for the reasons provided above regarding the statute's viability-determination provisions. Thus, like those provisions, the medical emergency exception provisions make it clear that the physician must entertain a subjective belief that the abortion is necessitated by a medical emergency, and this belief is to be assessed under an objective standard of reasonableness.

In contrast to the viability-determination standard addressed above, however, the medical emergency exception provisions are not subject to any scienter requirement. While the statute does require that the physician "intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable," this sole scienter requirement cannot reasonably be construed to extend to the physician's decision that the abortion is necessary to avoid death or substantial and irreversible impairment of the woman's health. Thus, no culpability attaches to the physician's determination of medical necessity. Consequently, the court will be required to decide whether the presence of an objective component in the standard for gauging physicians' medical judgments renders these provisions unconstitutionally vague in the absence of a curing mens rea requirement.

In making this determination, the court must once again consider the concerns voiced by the Supreme Court in Colautti about objective tests of physicians' professional conduct. In view of the plaintiffs' allegations that the determination of whether a medical emergency necessitates a post-viability abortion, like the determination of fetal viability specifically at issue in Colautti, is fraught with uncertainty and requires physicians to consider numerous

variables, as well as the plaintiffs' allegations that differing opinions among medical personnel put physicians at risk of criminal prosecution for an incorrect, though good-faith, medical judgment, the court concludes that the "perils of strict liability" described in Colautti arise with equal intensity here.

As the Court remarked in Colautti, where, as here, the specter of medical expert disagreement conjoins with a statute imposing strict criminal and civil liability for an erroneous medical determination, the result could very well be "a profound chilling effect on the willingness of physicians to perform abortions ... in the manner indicated by their best medical judgment." 439 U.S. at 396, 99 S.Ct. at 686. Simply stated, the Alabama post-viability abortion statute, as alleged by the plaintiffs, could permit a physician's good-faith medical judgment to later be second-guessed by experts, and thus could subject him or her to criminal and civil sanctions. As a result, the plaintiffs' allegations that physicians cannot be sure of the standard under which their actions will eventually be adjudged, and that they consequently would be inhibited in the exercise of constitutionally-protected rights, are well founded. Accordingly, the court concludes that the plaintiffs' vagueness challenge against the medical-emergency-determination provisions of the post-viability abortion statute is a claim upon which relief may be granted.

This conclusion is consistent with the recent decision in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 203-06 (6th Cir.1997), in which the Sixth Circuit affirmed the district court's ruling that a medical emergency exception in an enactment banning post-viability abortions was unconstitutionally vague because it employed both subjective and objective standards, and also lacked any scienter requirement. The Voinovich court noted that the medical emergency definition and medical necessity exception in the Ohio statute at issue, both of which required that the physician make determinations "in good faith and in the exercise of reasonable medical judgment," incorporated both subjective and objective standards for evaluating physicians' conduct, and therefore could subject physicians to criminal sanctions even when they exercise their good-faith

medical judgment. Id. In arriving at its decision to invalidate the post-viability abortion ban and regulations at issue in Voinovigh, the Sixth Circuit made the following observations, which are equally apt here:

"The determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others. Moreover, the lack of a scienter requirement is compounded by the fact that this Act requires that a physician meet both an objective and a subjective standard in order to avoid liability. While we need not decide whether employment of an objective standard with a scienter requirement would be constitutional, an objective standard without one is especially troublesome in the abortion context. In an area as controversial as abortion, the need for a scienter requirement is, as the Supreme Court pointed out, particularly important. In this area where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably. Under the Act, a physician who performs a post-viability abortion under either the medical emergency or medical necessity exception may be held liable, even if the physician believed he or she was acting reasonably, and in accordance with his or her best medical judgment, as long as others later decide that the physician's actions were nonetheless unreasonable."

130 F.3d at 205 (emphasis added).

(c) Vagueness as to Determination of Whether Medical Emergency Prevents Compliance with Procedural Requirements

The plaintiffs' next vagueness challenge concerns the provision of the post-viability act that excuses physicians from complying with the five procedural requirements for performance of a post-viability abortion where the nature of the medical emergency prevents such compliance. The pertinent provision reads as follows: "Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents

compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:...." 1975 Ala.Code § 26-22- 3(c) (Law.Co-op.Supp.1997) (emphasis added). Plainly, this provision, by use of the term "reasonable" to describe the medical judgment that must be employed, imposes a standard with an objective component on the physician's determination of whether compliance with one of the statute's procedural requirements is impossible due to the nature of the medical emergency. Additionally, examination of the statute reveals that liability for an erroneous determination under this provision is not subject to any scienter requirement. Thus, as the plaintiffs allege, the post-viability abortion statute imposes strict liability on a physician who forms an unreasonable medical judgment that a woman's medical condition prevents compliance with one or more of the five procedural requirements set forth in § 26-22-3(c)(1) through (5) of the act, and consequently fails to comply with those requirements.

Accordingly, the court must again decide whether the plaintiffs have stated a claim upon which relief may be granted that the objective component of the standard governing physicians' medical determinations, in the absence of a scienter requirement, renders the pertinent provisions unconstitutionally vague. In view of Colautti, and for all of the reasons stated above regarding the alleged vagueness of the provisions governing whether the post-viability abortion is medically necessary, the court finds that the plaintiffs have stated a claim concerning the provisions at issue here. Based upon the plaintiffs' allegations regarding the uncertainty inherent in physicians' judgments regarding the nature and implications of medical emergencies, the court concludes that the "perils of strict liability" discussed in Colautti are present here, where physicians exercising their good faith medical judgment regarding whether compliance with statutory requirements is prevented by a medical emergency could nonetheless be held liable if other physicians subsequently second-guess their determinations.

B. Alleged Undue Burden Imposed By the Partial-Birth Abortion Statute

Having addressed all of the vagueness challenges to the post-viability abortion statute, the court must next ascertain whether the plaintiffs have stated a claim regarding the alleged undue burden imposed on pregnant women by the partial birth abortion statute. The undue-burden challenges are grounded primarily on the Supreme Court's decision in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 872-76, 112 S.Ct. 2791, 2817-20, 120 L.Ed.2d 674 (1992), in which a plurality of the Court abandoned the trimester- based analytic framework for determining the constitutionality of abortion regulations developed in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in favor of one that requires courts to ascertain whether pre-viability abortion regulations impose an undue burden on the woman's right to make the ultimate decision whether to terminate her pregnancy. In somewhat more concrete terms, Casey forbids states from enacting pre-viability abortion regulations that have "the purpose and effect of placing a substantial obstacle in the path of a woman seeking an abortion." See id., 505 U.S. at 877, 112 S.Ct. at 2820.

As alluded to above in the context of the plaintiffs' vagueness challenges, the court must resolve an important threshold issue prior to undertaking the undue-burden analysis. Specifically, the court must determine whether the standard governing this analysis is that articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), under which the court may invalidate the statute only after concluding that it imposes an undue burden under all possible circumstances, or the standard that was actually employed in Casey itself, where the Supreme Court looked at whether "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a women's choice to undergo an abortion." Casey, 505 U.S. at 895, 112 S.Ct. at 2830 (emphasis added). Although at first blush it seems obvious that the court should apply the less- restrictive Casey formula, the answer is not so straightforward because the Casey plurality did not explicitly acknowledge that it had abandoned the Salerno test in the pre-viability abortion context in favor of the less stringent standard it applied, and individual justices in post-Casey opinions have adopted inconsistent positions concerning this

question, as have several lower courts. See Voinovich, 130 F.3d at 194-95 (citing conflicting post-Casey statements made by various Supreme Court justices regarding Salerno's continued vitality, and holding that the Casey standard applies to pre-viability abortion regulations after surveying the pertinent post- Casey lower court decisions and noting that the Third, Eighth, and Tenth Circuits, as well as two district courts, apply that standard, while only the Fifth Circuit applies the more stringent Salerno test). The Eleventh Circuit has not yet grappled with this issue, which appears to be one of first impression in this circuit.

This court agrees with the majority of courts that have addressed this question and concludes that challenges to the pre-viability application of the Alabama abortion statutes are governed by the Casey standard, rather than that set forth in Salerno.[36] In doing so, this court, like the Sixth and Eighth Circuits, has decided to "follow what the Supreme Court actually did--rather than what it failed to say--and apply the undue-burden test." See Voinovich, 130 F.3d at 195-96; Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir.1995). Therefore, in determining whether the plaintiffs have stated a claim that the partial-birth abortion statute imposes an undue burden on women seeking pre-viability abortions, the court will ascertain whether the plaintiffs have alleged that "in a large fraction of cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Casey, 505 U.S. at 895, 112 S.Ct. at 2830. Accordingly, as the Sixth Circuit stated in Voinovich, "Even if the Act has some constitutional applications, [the court] must strike it down if it is unconstitutional under Casey." 130 F.3d at 196.

The plaintiffs level two primary undue burden challenges against the act: (1) that to the extent the statute prohibits a woman from obtaining a pre- viability abortion

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[36]This conclusion applies only to the plaintiffs' pre-viability challenges; whether the Salerno or Casey standard governs the plaintiffs' post-viability challenges to the Alabama abortion statutes is a separate question that is taken up below.

altogether, because it forecloses her use of the most common and safest means available, it imposes an undue burden; and (2) that to the extent the statute forces a woman who chooses to terminate her pregnancy to use an alternative method to the one she prefers, with an attendant increase in risk to her health, it imposes an undue burden.

As other courts that have examined analogous partial-birth abortion statutes have observed, the Supreme Court has offered only limited guidance as to how the Casey standard is to be applied in the context of a ban on a specific abortion technique. See Voinovich, 130 F.3d at 200-01; Evans v. Kelley, 977 F.Supp. 1283, 1315-16 (E.D.Mich.1997). While no post-Casey Supreme Court decisions have addressed such a ban, the Court in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), did examine a statute that banned a specific abortion procedure, and thus this decision offers some guidance as to how this court should approach the plaintiffs' challenges to Alabama's partial-birth abortion statute.

In Danforth, the Court invalidated a Missouri statutory ban on the use of the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy. Having found that saline amniocentesis was a very safe and prevalent procedure for post-first-trimester abortions, the Court concluded that the act, "as a practical matter ... forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79, 96 S. Ct. at 2845. As a consequence, according to the Court, the act represented "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting the vast majority" of second trimester abortions, and thus could "not withstand constitutional challenge." Id.

Consistent with the approaches taken in both Danforth and Casey, this court, like the courts addressing partial-birth abortion bans in Voinovich and Evans, will determine whether the Alabama act imposes an undue burden by examining whether there are safer alternative procedures available in the state than those alleged to be banned by the act. See Voinovich, 130 F.3d at 200-01 (finding that the challenged

statute imposed an undue burden because it banned "the most common method of abortion in the second trimester"); Evans, 977 F.Supp. at 1315-19 (finding that the challenged statute imposed an undue burden by comparing the banned procedures to other available pre-viability abortion procedures). Thus, before the court may ascertain whether the plaintiffs have stated a claim that the partial-birth abortion statute imposes an undue burden and so is unconstitutional under Casey, it must first determine with precision the actual procedures that are subject to the act's proscription. In other words, the court cannot perform the requisite comparison of the relative safety of the banned techniques and any other available procedures without first understanding exactly which techniques are banned by the statute.

The court is not presently in a position to undertake this comparison because it has not yet determined which abortion procedures are banned by the partial- birth abortion statute. Instead, because the relevant provisions of the statute have not yet been construed by the Alabama courts, and the particular construction adopted by that court will undoubtedly affect the determination of the constitutional questions raised in the complaint, the court has opted to certify the question of which specific techniques are outlawed by the statute to the Alabama Supreme Court. Consequently, until that court has spoken, this court cannot determine whether the plaintiffs' undue burden challenges against the partial-birth abortion statute state a claim upon which relief may be granted. The court will therefore postpone ruling on this issue until the Alabama Supreme Court has responded to the certified questions, and the foregoing discussion is intended to provide the parties with guidance as to the analytical scheme the court will employ to adjudicate the plaintiffs' undue burden challenges to the partial-birth abortion statute.

C. Alleged Unconstitutionality of the Partial-Birth Abortion Statute Due to Lack of a Maternal Health Exception

The plaintiffs also challenge the constitutionality of the partial-birth abortion statute to the extent it regulates post viability abortions. Specifically, the plaintiffs assert that

the ban is unconstitutional because the sole emergency exception provision in the statute, § 26-23-4, relieves the physician of liability only where the partial-birth abortion is necessary to save the woman's life, and not for abortions deemed necessary to preserve maternal health more generally. In support of this argument, the plaintiffs point to the Court's statement in Casey that it "re-affirm[ed] Roe's holding that subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879, 112 S.Ct. at 2821 (emphasis added). According to the plaintiffs, the Alabama statute is unconstitutional under this standard because it could impermissibly force a women to undergo a more dangerous and life-threatening procedure even where her physician concludes that an abortion procedure proscribed by the act is necessary to preserve her health; thus, it is only when the woman is actually dying, the plaintiffs contend, that she may have recourse to the proscribed procedures.

Despite the fact that this court has decided to certify to the Alabama Supreme Court questions pertaining to the definition of the precise procedures proscribed by the partial-birth abortion statute, it sees no reason to postpone its decision on whether this challenge presents a claim upon which relief may be granted. It seems clear that, regardless of how the Alabama Supreme Court construes the statute, post-viability applications of certain abortion procedures will be banned. Thus, the question of whether the alleged absence of a maternal health exception renders the statute unconstitutional, to the extent that it proscribes post-viability abortions, will not be rendered moot, or be substantially altered, by the state court's answer to the certified questions.

i. Legal Standard for Facial Challenges to Post-Viability Abortion Regulations

Before it may consider whether this challenge to the partial-birth abortion statute, based upon its alleged lack of any maternal health exception, constitutes a claim upon which

relief may be granted, the court must first revisit the question of whether the applicable standard for such a facial challenge to a statute is that articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), which requires that the plaintiffs show that "no set of circumstances exist under which the [statute] would be valid," or the standard employed in Casey, under which the plaintiffs must demonstrate that the statute would be unconstitutional "in a large fraction of the cases in which [it] is relevant." [37]

This determination is distinct from that undertaken previously by the court in relation to the plaintiffs' challenges to the pre viability regulation of abortions, because the

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[37]The determination of which standard governs the plaintiffs' challenge to the post-viability application of the partial-birth abortion statute is critical. Should the court find that Salerno applies, the plaintiffs would face an insurmountable barrier. Specifically, they could never establish that "no set of circumstances" exists under which the statute would be valid, because they could not demonstrate that all women seeking post-viability abortions would suffer a medical emergency that required them to undergo a partial-birth abortion to preserve their health. That is, the plaintiffs could not counter an argument that in the vast majority of cases in which women seek post-viability abortions, the statute would impose no burden whatsoever because all but a few such women would not face a medical emergency necessitating recourse to a partial- birth abortion procedure to preserve their health.

By contrast, the plaintiffs could possibly satisfy the more permissive Casey standard, by alleging facts sufficient to establish that "in a large fraction of the cases" in which women seek post-viability abortions, the absence of a maternal health exception in the partial-birth abortion statute would unconstitutionally deprive women of access to a technique that would better preserve their health than non-proscribed alternative procedures. See Casey, 505 U.S. at 894-95, 112 S.Ct. at 2829-30 (rejecting state's argument that the challenged abortion regulation imposed almost no burden at all on the vast majority of women seeking abortions, and stating that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant").

Supreme Court had occasion to apply the less restrictive test in Casey only as to pre-viability enactments, and not those proscribing or regulating post-viability abortions.

The attorney general defendants contend that this question is not controversial, because in the area of post-viability regulations, "there is no post-Casey confusion as to the applicability of the Salerno ... standard."[38] The attorney general defendants therefore argue that under the governing Salerno standard the plaintiffs' claims contesting the constitutionality of the post-viability applicability of the partial-birth abortion statute should be dismissed because the plaintiffs have failed to allege that "no set of circumstances exist under which the Act would be valid" in the post-viability context. However, the attorney general defendants cite no post-Casey decisions to support their rather conclusory assertion that no confusion surrounds the post-viability applicability of the Salerno standard, and the court's investigation indicates that any absence of confusion stems solely from the fact that the instant dispute is only the second one in which courts have been confronted with this precise question. See Voinovich, 130 F.3d at 196. Moreover, as explained below, in Voinovich, the one other instance in which this question has been addressed, the Sixth Circuit concluded that the Casey "large fraction of cases" standard, and not that articulated in Salerno, governs facial challenges to post-viability regulations. See id.

In Voinovich, the Sixth Circuit recognized that Casey itself does not answer the question of which standard to apply in the post-viability context. Id. Nonetheless, the court affirmed the district court's holding that Casey's standard should be extended to post-viability abortion regulations,

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[38]Supplemental memorandum in support of defendants' motion to dismiss, filed on September 22, 1997 (Doc. no. 22), at 37 n. 21.

because it could "see no reason to apply a different standard for pre and post-viability abortions." Id. The district court had provided the following explanation for its conclusion:

"After careful consideration of the interests involved, this Court concludes that the Salerno requirement that the plaintiff must show that 'no set of circumstances exists under which the law would be valid,' should not apply to facial challenges to post-viability abortion regulations which may unconstitutionally threaten the life or health of even a few pregnant women. The Court so holds for three reasons. First, the cases which have applied Salerno have not involved laws which threaten to inflict, unconstitutionally, such severe and irreparable harm. Second, because the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life and health. Finally, and most importantly, it would be unconscionable to hold that a pregnant woman--or her estate--may not challenge a post-viability regulation until after she is unconstitutionally deprived of her life or health. Therefore, this Court will allow Plaintiff to facially challenge this post-viability ban, even though he has not shown that 'no set of circumstances' exists under which the ban would be valid."

Women's Medical Professional Corp. v. Voinovich, 911 F.Supp. 1051, 1062 (S.D.Ohio 1995) (internal footnote omitted).

Although this court largely agrees with this analysis, and reaches the same conclusion, further explanation is warranted. In determining whether the Casey standard should apply to post-viability regulations, the court must be sure to take into account the fact that the state has a "profound interest" in potential life, which may be promoted subsequent to viability by regulation, or even proscription, of abortion, except where necessary to preserve maternal life or health. See Casey, 505 U.S. at 878-79, 112 S.Ct. at 2821. As the Casey plurality stated, after viability has been reached, this interest

in potential life has "sufficient force so that the right of the woman to terminate the pregnancy can be restricted." Id. at 869, 112 S.Ct. at 2816. In other words, post-viability, "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." Id. at 870, 112 S.Ct. at 2817. By contrast, in the pre-viability context, where the majority of courts have rejected the Salerno approach in favor of that of Casey, the woman's rights are not outweighed by those of the state. As a result, the state is limited to adopting "measures to ensure that a woman's choice is informed ... as long as their purpose is to persuade the woman to choose childbirth over abortion [and they are not] an undue burden on the right [of the woman to obtain a pre-viability abortion]." Id.

Accordingly, the question of whether Casey's less-restrictive standard applies to post-viability abortion regulations must accord sufficient deference to the enhanced strength of the state's interest in protecting potential life at that stage of the pregnancy. Although neither the Sixth Circuit nor the district court in Voinovich explicitly discussed whether this interest of the state militates against extending the Casey pre- viability standard to the post-viability context, and thus one cannot determine whether these courts considered this crucial issue, this court concludes that the Voinovich district court's second and third rationales do provide a sufficient basis for adopting the Casey standard even in the face of the enhanced state interest in potential life.

The district court in Voinovich explained its second rationale for extending the Casey standard to post-viability regulations as follows: "[B]ecause the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life an health." Voinovich, 911 F.Supp. at 1062. Thus, the district court concluded that because pregnant women's constitutional interest in their own life and health is even stronger than the women's liberty

interest in choosing to terminate a pregnancy, the Supreme Court would perceive no difficulties in applying the permissive Casey standard to an arena where the former interest is implicated by a state's restrictions on post-viability abortions.

This court agrees that a woman's profound constitutional interest in her own life and health justifies extension of the Casey standard to the post- viability abortion arena, because this interest is sufficiently powerful to overcome the state's interest in potential life even after the viability threshold has been crossed. See Casey, 505 U.S. at 879, 112 S.Ct. at 2821 (recognizing women's interest in their own life and health by re-affirming that post-viability abortions may not be proscribed or regulated where they are necessary to preserve the life or health of the mother). Thus, this court, like the district court in Voinovich, sees no reason why the Supreme Court would not apply the Casey standard to facial challenges to post-viability abortion regulations.

This conclusion is bolstered by the third rationale provided by the Voinovich district court for its adoption of the Casey standard, that "it would be unconscionable to hold that a pregnant woman--or her estate--may not challenge a post-viability regulation until after she is unconstitutionally deprived of her life or health." 911 F.Supp. at 1063 (emphasis in original). This well-founded concern stems from the district court's recognition that the all-but-insurmountable Salerno standard would effectively close the courthouse doors to facial challenges to abortion statutes even where a plaintiff alleges that her life or health interests are jeopardized unconstitutionally, leaving no alternative aside from an "as applied" challenge brought after the plaintiff has suffered a constitutional injury under the challenged act. Of course, as the Voinovich district court appreciated, such lawsuits would come too late for women who have died or whose health has been irreparably damaged because a necessary abortion procedure was rendered off-limits by an unconstitutional state enactment.

Thus, for the foregoing reasons, the court will apply the Casey standard to adjudicate the plaintiffs' facial

challenges to the post-viability application of the partial-birth abortion statute.[39] And thus, for purposes of the pending motion to dismiss, the court will permit the plaintiffs to mount a facial attack on the disputed post-viability regulations even if they cannot demonstrate that " 'no set of circumstances' exists under which the pertinent provisions would be constitutional. Instead, the plaintiffs must merely allege sufficient facts to indicate that these provisions would be unconstitutional in a large fraction of the cases in which [they are] relevant." See Casey, 505 U.S. at 895, 112 S.Ct. at 2830 (plurality opinion)

ii. Application of the Legal Standard to Plaintiffs' Challenges to the Post- Viability Application of the Partial-Birth Abortion Statute

As stated, the plaintiffs' challenge to the partial-birth abortion statute based upon its lack of any maternal health exception relies heavily upon the Casey Court's express reaffirmance of Roe's holding that, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879, 112 S.Ct. at 2821 (emphasis added). The plaintiffs further rely upon the Supreme Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69, 106 S.Ct. 2169, 2183, 90 L.Ed.2d 779(1986), and a Tenth Circuit decision, Jane L. v. Bangerter, 61 F.3d 1493, 1504 (10th Cir.1995), rev'd on other grounds sub nom. Leavitt v. Jane L., 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996), on remand, 102 F.3d 1112 (10th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997), in support of this argument.

In Thornburgh, a pre-Casey decision, the Supreme Court invalidated a Pennsylvania statute that compelled

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[39]For the reasons stated above, this standard will also be applied to the plaintiffs' challenges to the provisions of Alabama's post-viability abortion statute.

physicians performing post-viability abortions to employ the technique that "would provide the best opportunity for the unborn child to be aborted alive, unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment." 476 U.S. at 768 n. 13, 106 S.Ct. at 2183 n. 13 (emphasis added). The Court expressly agreed with the Third Circuit's holding that this provision was unconstitutional "because it required a 'trade-off' between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration." Id. at 768-69, 106 S.Ct. at 2183 (citing Colautti, 439 U.S. at 397-401, 99 S.Ct. at 686-689).

Similarly, the Tenth Circuit in Jane L. struck down as unconstitutional two sections of a Utah abortion statute that required physicians to perform post- viability abortions in a manner that would "give the unborn child the best chance of survival," unless such a method would cause "grave damage to the woman's medical health." 61 F.3d at 1502-05. The Jane L. court rejected the defendants' contention that the portions of Thornburgh discussed above were "uprooted by Casey," and instead concluded that Thornburgh governed the determination of whether the provisions at issue were constitutionally infirm.[40] Noting that the Utah statute dictated that fetal survival must take precedence over maternal health absent a risk of "grave damage," the Jane L. court held that the statute violated the "consistent strain of abortion jurisprudence," running through the Supreme Court's decisions in Roe, Thornburgh, and Casey, requiring that "maternal health, not fetal survival, remains the physician's paramount consideration." Jane L., 61 F.3d at 1504. As the

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[40]The Tenth Circuit stated, and this court agrees, that although Casey overruled the portions of Thornburgh that addressed the issue of informed consent, the Supreme Court left intact Thornburgh to the extent that it relied upon Roe's approach to post-viability regulation of abortions, which was expressly reaffirmed in Casey. See Jane L., 61 F.3d at 1504 & n. 9.

Tenth Circuit further explained:

"'Grave damage' is clearly a higher standard than the Court has articulated. According to Casey, Thornburgh, and Roe, concern for the 'preservation' of a woman's health suffices to elevate her liberty interests decisively above those of the state or the unborn child. By requiring a woman to suffer 'grave damage' to her health before her liberty interests predominate, the Utah legislature violated those portions of Roe and Thornburgh that Casey reaffirmed, and unconstitutionally devalued a woman's privacy rights."

Id.

Although this court recognizes that both Thornburgh and Jane L. addressed statutes that purported to ban post-viability abortions generally, except under particular circumstances, including when certain medical emergencies exist, while Alabama's partial-birth abortion statute bans the post-viability application of only a specified type of abortion procedure, the court concludes that the reasoning underlying Thornburgh and Jane L. applies with equal force here. All three abortion statutes (those in Thornburgh, Jane L., and the partial-birth abortion statute at issue here) have the effect of limiting the woman's, and her doctor's, choice of an appropriate abortion method, creating the possibility that a preferred method may be proscribed except where there exists a medical emergency satisfying certain specific requirements. In fact, because the plaintiffs allege that the Alabama statute is devoid of any exception whatsoever to protect maternal health, while the two state enactments addressed in Thornburgh and Jane L. did at least contain some form of health exception, rather than just an exception to protect the pregnant woman's life, the constitutional infirmity may be even more pronounced here than it was in Thornburgh and Jane L. Thus, in view of these decisions and the plaintiffs' allegations that the Alabama partial-birth abortion statute lacks any maternal health exception whatsoever, the court concludes that this challenge to the partial birth abortion statute presents a claim upon which relief may be granted.

D. Alleged Unconstitutionality of the Partial-Birth Abortion Statute's Civil Liability Provisions

In their final attack on the constitutionality of the partial-birth abortion statute, the plaintiffs challenge the civil-liability provisions of the act, which provide for tort claims against the physician performing the proscribed abortion. Either the "father" of the fetus, if married to the woman who underwent the abortion, or the "maternal grandparents" of the fetus, if the woman was a minor at the time, may bring such an action. No suit may be brought by the complainant if the complainant consented to the abortion, or if the complainant's criminal conduct caused the pregnancy.

The plaintiffs support their argument by reference to a number of Supreme Court decisions that have addressed the constitutionality of statutes providing for a spousal or parental "veto" of a woman's decision to terminate her pregnancy, as well as decisions that have examined similar "notification" provisions. The plaintiffs assert that the liability provisions in the Alabama act are tantamount to the types of spousal or parental consent and notification requirements that the Supreme Court has invalidated as creating an unconstitutional impediment to a woman's right to terminate her pregnancy, because although they do not expressly require that the woman or her physician obtain the consent of the husband or parents, only by seeking such consent may the physician evade liability under the statute. The plaintiffs further support this argument by bringing to the court's attention a recent decision, Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F.Supp. 1369, 1379-1380 (D.Ariz.1997), in which the district court held unconstitutional an Arizona partial-birth abortion statute containing a civil liability provision analogous to that in the Alabama enactment because, among other reasons, it found that there is no practical difference between such a provision and one that mandates spousal or parental consent. [41]

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[41]The pertinent provision of the Arizona act reads as follows:

"The father of the fetus if married to the mother at the time

The attorney general defendants urge the court to dismiss this claim on two grounds. First, they assert that the plaintiffs cannot bring the claim under the fourteenth amendment because, in the context of civil lawsuits for damages, the requisite "state action" does not exist until an enforceable judgment against the plaintiffs has been entered. Second, the attorney general defendants contend that the civil-liability provisions further rational state interests and do not sufficiently interfere with women's right to a pre-viability abortion to constitute an undue burden under Casey. To support this latter point, the attorney general defendants direct the court's attention to Midtown Hosp. v. Miller, No. 1:97-CV-1786-JOF, slip. op. at 13-16 (N.D.Ga. July 24, 1997), in which the district court upheld a Georgia partial- birth abortion statute containing a civil-liability provision whose language tracks that of the Alabama and Arizona statutes.

The court rejects both of these arguments, and concludes that the plaintiffs' challenge to the civil liability provision of the partial-birth abortion statute presents a claim upon which relief may be granted. Regarding the attorney general defendants' contention that the plaintiffs cannot attack the constitutionality of the civil liability provisions under the fourteenth amendment absent an enforceable judgment entered by a state court, the court agrees, of course, that there must be "state action" in order for the plaintiffs to raise a claim of violation of the fourteenth amendment's due process

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she receives a partial-birth abortion and the maternal grandparents of the fetus if the mother is not at least eighteen years of age at the time of the partial- birth abortion may bring a civil action to obtain appropriate relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the partial-birth abortion. Relief pursuant to this subsection includes the following:

1. Monetary damages for all injuries resulting from the partial-birth abortion, including psychological and physical damages.

2. Damages in an amount equal to three times the cost of the partial-birth abortion."

Ariz.Rev.Stat. Ann. § 13-3603.01(C).

clause. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). However, the court rejects the attorney general defendants' assertion that state action does not exist here absent a civil judgment against the plaintiffs entered by a state court. Instead, the court concludes that the requisite state action has been alleged by the plaintiffs, when they assert that the civil liability provisions are, in practical terms, akin to statutory requirements that women seek the consent of their parents or spouses before obtaining abortions. In other words, the plaintiffs allege that these provisions, far from functioning merely as neutral statutes that facilitate civil suits between private parties, represent a conscious effort by the state to make it more difficult for women to obtain desired abortions by requiring the women, or their physicians, to first secure their parents or spouses' consent. These allegations of purposeful, albeit somewhat circuitous, state regulation of women's conduct are sufficient to support a conclusion that the requisite state action exists with regard to the challenged civil liability provisions.

This conclusion is reinforced by the additional fact that the plaintiffs here allege that the enactment of the allegedly unconstitutional partial-birth abortion statute caused them injury by threatening them with potential criminal and civil liability if they continue their professional--and allegedly constitutionally-protected--activities. Thus, here the plaintiffs contend that state action sufficient to permit their claims occurred during the enactment of the challenged statute by the state legislature and the governor, and the plaintiffs need not depend upon any actual or potential private enforcement of the statutes by litigants bringing civil actions. See Denver Area Educational Telecommunications Consortium Inc. v. F.C.C., 518 U.S. 727, ----, 116 S.Ct. 2374, 2404, 135 L.Ed.2d 888 (1996) (Kennedy, J., concurring in part and dissenting in part) (agreeing with plurality opinion's holding that the enactment of the challenged statute constituted state action, and noting that "state action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State"); Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 880 (9th

Cir.1987) ("State laws whether statutory or common law ... constitute state action."). Consistent with this fact, the plaintiffs have named as a defendant in this action Alabama's governor, one of the state actors responsible for the enactment of the statute. Accordingly, the court finds that the plaintiffs may pursue their challenge to the civil liability provisions of the two abortion statutes pursuant to the fourteenth amendment.[42]

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[42]The court acknowledges that other courts have held, under certain circumstances, that the mere enactment of a statute, without further involvement of state actors in the allegedly unconstitutional conduct, may not provide the requisite state action for purposes of an action under the fourteenth amendment. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (noting that the enactment of "self-executing" statutes of limitations addressed in previous decisions was obviously state action, but that "the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause."); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (holding that the sale by a storage company of an individual's property to enforce a lien on that property, pursuant to a provision of the New York Uniform Commercial Code, did not constitute "state action" for fourteenth amendment purposes.) In Flagg Bros., the Court expressly rejected the plaintiffs' claim that the proposed sale of their property by the defendant storage company was attributable to the state because it had "authorized and encouraged" such action by enacting the applicable provision. Id. at 164-66, 98 S.Ct. at 1737-38.

Significantly, however, Flagg Bros. concerned an attempt to sue a non- state-actor defendant on the basis of its exploitation of the challenged statutes, and did not involve a claim, such as that raised here, brought against a state actor responsible for the enactment of the challenged statute based upon allegations that the very enactment of the statute threatened to chill the plaintiffs' exercise of constitutionally-protected rights. In fact, the Court in Flagg Bros. did not specifically address the state action implications of enactment of the statute, but rather determined that private parties acting pursuant to the statute were not state actors because

The court also rejects the attorney general defendants' second contention, that the civil liability provisions do not impose an undue burden because they further rational state interests and operate only in a limited set of circumstances. As stated, the plaintiffs allege that the civil liability provisions are tantamount to statutory requirements that women seek the consent of their parents or spouses before obtaining abortions. These allegations are sufficient to support a claim upon which relief may be granted. See Planned Parenthood of Southern Ariz. v. Woods, 982 F.Supp. 1369, 1379-1380 (D.Ariz.1997) (holding that analogous civil liability provisions are unconstitutional because they are akin to spousal and parental consent provisions). The Supreme Court has found that abortion statutes requiring notification of husbands can "prevent a significant number of women from obtaining an abortion," and thus impose an undue burden on their right to abortion. See Casey, 505 U.S. at 893-94, 112 S.Ct. at 2829 (further noting that, in view of the myriad legitimate fears women have about informing their husbands that they intend to seek an abortion, a spousal notification provision "does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle"). Additionally, the Supreme Court has consistently required that statutes mandating parental consent must provide for a judicial bypass procedure. Id. at 899, 112 S.Ct. at 2832; Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-19, 110 S.Ct. 2972, 2978-83, 111 L.Ed.2d 405 (1990); Bellotti v. Baird, 443 U.S. 622, 643-44, 99 S.Ct. 3035, 3048, 61 L.Ed.2d 797 (1979) (plurality opinion). The partial-birth abortion statute provides for no such bypass procedure. Thus, the court declines to conclude, as the attorney general defendants urge, that the civil liability provision does not, as a matter of law, impose an undue burden on women seeking abortions. Accordingly, the court will not dismiss this

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the statute had not delegated to the private parties functions exclusively reserved to the state. 436 U.S. at 157-64, 98 S.Ct. at 1733-37. Furthermore, in Flagg Bros. the plaintiffs made no contention, as is made here, that the challenged statute was tantamount to a direct effort by the state to regulate allegedly constitutionally- protected conduct. Thus, the holding in Flagg Bros. is inapposite here.

challenge to the partial-birth abortion statute as failing to state a claim upon which relief may be granted.

E. Alleged Unconstitutionality of the Post-Viability Abortion Statute Due to "Trade-Off" between Woman's Health and Fetal Survival

In their final challenges, leveled against the post-viability abortion statute, the plaintiffs assert that the procedural requirements imposed by the statute on physicians performing post-viability abortions constitute an impermissible "trade-off" between the health of the pregnant woman and the fetus' survival. Specifically, the plaintiffs target the following requirements in the statute: (1) the requirement in § 26-22-3(c)(2) that the physician obtain the concurrence of a second physician regarding the necessity for the post-viability abortion; (2) the requirement in § 26-22-3(c)(3) that the abortion be performed in a hospital; (3) the requirement in § 26-22-3(c)(4) that the physician use the abortion technique that "provides the best opportunity for the unborn child to survive," except where this method would pose "a significantly greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function of the woman than would other available methods"; and (4) the requirement in § 26-22-3(c)(5) that the physician arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician who is charged with caring for the aborted child.

Before considering whether these challenges present claims upon which relief may be granted, the court first notes that each of the disputed requirements is subject to the medical emergency exception discussed in detail above, which provides that the physician need not satisfy the requirement "in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance...." 1975 Ala.Code § 26-22-3(c) (Law.Co-op.Supp.1997). As previously explained, the court has concluded that the plaintiffs have stated a claim that this emergency exception is unconstitutional because they allege that it imposes an objective standard of conduct without a curing scienter requirement. If the plaintiffs prevail on this

claim, all of the challenged procedural requirements would fall as well, because they would no longer be subject to an exception, as required under the pertinent Supreme Court case law, for the preservation of the life or health of the mother. See Casey, 505 U.S. at 879, 112 S.Ct. at 2821 (reaffirming Roe's holding that the state may regulate post-viability abortions "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."); cf. Voinovich, 130 F.3d at 206 (noting that because it had invalidated the medical emergency and necessity provisions of a post-viability abortion act, the court did not need to reach the constitutionality of the remaining post-viability regulations). Therefore, because the court will reach the merits of the plaintiffs' challenges to the procedural requirements of the post-viability abortion statute only if it upholds the constitutionality of the medical emergency exception, the court will assume for the sake of determining whether these challenges present a claim upon which relief may be granted that the exception is constitutional, and thus operates to relieve the physician of responsibility for complying with any of the requirements where a medical emergency prevents such compliance.

The attorney general defendants' contention is wellfounded that all of the challenged requirements were included in the act to further the state's interest in the potential life of the fetus. This interest, as stated, is a "profound" one that may override the liberty rights of women seeking post-viability abortions. See Casey, 505 U.S. at 870, 112 S.Ct. at 2817; see also Planned Parenthood v. Ashcroft, 462 U.S. 476, 482-86, 103 S.Ct. 2517, 2520-22, 76 L.Ed.2d 733 (1983) (reaffirming Roe's holding that the state's interest in potential life is compelling, and upholding certain regulations of physician conduct during post-viability abortions because they "reasonably further" that compelling interest of the state). Thus, in determining whether the plaintiffs' challenges to the post-viability abortion statute should be dismissed, the court must ascertain whether the plaintiffs have alleged that the disputed statutory requirements do not "reasonably further" the state's compelling interest in potential life.

While the plaintiffs do not contest the applicability

of this standard to their "trade-off" challenges, they rely upon the Supreme Court's holding in Thornburgh to urge the court to reject the attorney general defendants' contention that these claims should be dismissed. Specifically, the plaintiffs point to the holding in Thornburgh that abortion statutes must not create "an impermissible 'trade-off' between the woman's health and fetal survival," and thus fail to "require that maternal health be the physician's paramount consideration." 476 U.S. at 768-69, 106 S.Ct. at 2183. Each of the challenged requirements in the post-viability abortion statute, the plaintiffs contend, violates this constitutional standard, and must therefore be invalidated.

The plaintiffs make their point most persuasively with respect to § 26-22- 3(c)(4) of the statute, which, as noted above, requires that the physician use the abortion technique that "provides the best opportunity for the unborn child to survive," except where this method would pose "a significantly greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function of the woman than would other available methods." Such a provision is known as a "choice-of-method" provision, because it restricts the woman's, and her doctor's, ability to choose the exact post- viability abortion method to be employed. See Jane L., 61 F.3d at 1502-03. The plaintiffs maintain that the choice-of-method provision in the Alabama act is unconstitutional because it permits safer alternative techniques to be used only when the method that maximizes the fetus's chances for survival poses a "significantly greater risk" than the safer techniques, and not when, as is medically prudent, the statutorily-mandated technique is merely more risky than the alternative techniques. This restriction on the choice of abortion method, according to the plaintiffs, contravenes the pertinent Supreme Court standard because it favors fetal survival over maternal health and fails to ensure that the latter will remain the physician's paramount concern during the abortion procedure.

The court concludes that these allegations are sufficient to present a claim upon which relief may be granted. As discussed above, the notion of an impermissible "trade-off" between maternal health and fetal survival, as applied to

choice-of-method provisions, first emerged in Thornburgh. The provision invalidated in that case required that physicians performing post- viability abortions employ the technique "which would provide the best opportunity for the unborn child to be aborted alive unless ... that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique...." 476 U.S. at 768 n. 13, 106 S.Ct. at 2182 n. 13 (emphasis added). Thus, this choice-of-method provision, like that found in the Alabama post-viability abortion statute, employed a significantly greater risk standard. Consequently, the Thornburgh Court's holding that the statutory language "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus" enjoys equal weight here, as does the Court's conclusion that the provision therefore is unconstitutional. In view of this fact, the court concludes that the plaintiffs have stated a claim upon which relief may be granted.

This conclusion withstands the court's assumption, stated above, that the emergency exception to the choice-of-method requirement is found constitutional and thus circumscribes the operation of this provision. Pursuant to that emergency exception, the physician would only be relieved of the responsibility for using the less safe, but statutorily-mandated, procedure where the medical emergency is such that that procedure would "create a serious risk of substantial and irreversible impairment of a major bodily function." See 1975 Ala.Code. § 26-22-2(6) (Law.Co-op.Supp.1997) (definition of "medical emergency"). Because this "serious risk" standard is also susceptible to attack, in view of Thornburgh, as too restrictive and thus as imposing an impermissible trade-off between maternal health and fetal survival, the court stands by its conclusion that the plaintiffs have indeed stated a claim that the choice-of-method provision contravenes Supreme Court precedent concerning post-viability abortion regulations.

As far as the plaintiffs' allegations regarding the remaining procedural requirements of the post-viability abortion statute are concerned, the attorney general

defendants argue that the Supreme Court's decision in Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), compels a conclusion that the challenged provisions are constitutional because they reasonably further the state's compelling interest in potential life. In Ashcroft, the Court upheld a Missouri statutory provision that required the presence of a second physician at the abortion of a viable fetus and that the second physician "take all reasonable steps in keeping with good medical practice ... to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." 462 U.S. at 483, 103 S.Ct. at 2521. The Court disagreed with the lower courts' rulings that this provision was unconstitutional, and instead held that it reasonably furthered the state's compelling interest in protecting the lives of viable fetuses. In doing so, the Court rejected the argument that a second-physician requirement "distorts the traditional doctor-patient relationship, and is both impractical and costly." Id. at 483-484, 103 S.Ct. at 2521-22.

The attorney general defendants' reliance on Ashcroft is most clearly pertinent to the plaintiffs' challenge to § 26-22-3(c)(5) of Alabama's post-viability abortion statute, which mandates that a second physician be present at the abortion and care for the aborted child.[43] Importantly, however, the

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[43]Although the plaintiffs do not describe the precise nature of this challenge to the second-physician-attendance requirement, it appears that they may be pursuing one or both of two separate theories: (1) that the requirement creates an impermissible trade-off between maternal health and fetal survival by mandating that the second physician take steps to save the aborted child even if such efforts increase the risk to the mother; and (2) that the requirement creates such a trade-off because it imposes time delays, increased expenses, or other factors adverse to the mother's health. The court finds that the plaintiffs have stated a claim on the basis of the first of these theories, as explained below in the main text of this memorandum opinion.

Moreover, the court finds that the second theory also

Alabama and Missouri provisions differ in the standards that govern the circumstances under which compliance with the second- physician-attendance requirement is waived. Under the Missouri statute, physicians need not comply with the requirement if the steps taken by the second physician merely "pose an increased risk" to the woman's life or health, while the analogous requirement in the Alabama act is waived only if compliance would "create a serious risk of substantial and irreversible impairment of a major bodily function." [44] Plainly, the Alabama act imposes a more restrictive standard on physicians, for even if the second physician's efforts to care for the aborted child do create an increased risk to the mother's health, those efforts must be undertaken, unless the

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supports a claim upon which relief may be granted. As explained more fully below in the context of the plaintiffs' challenges to the second-physician-concurrence and hospitalization requirements in the statute, the Supreme Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-39, 103 S.Ct. 2481, 2495-97, 76 L.Ed.2d 687 (1983), can be read in conjunction with Thornburgh to establish that an impermissible trade-off between maternal health and fetal survival results when a statute imposes delays upon a woman in medical need of a post-viability abortion, and thereby increases the risk of the procedure. Thus, the plaintiffs can prevail on this claim if they demonstrate that compliance with the second- physician-attendance requirement could result in an increased risk to the pregnant woman due to delays associated with securing the attendance of the second physician. Under such circumstances, the physician may be unable to ensure that the pregnant woman's health remain his paramount consideration, as required by Thornburgh, if he deems an immediate abortion to be less risky to the woman than one performed at a later time with the second physician present. Accordingly, in light of these considerations and the plaintiffs' allegations regarding the increase in risk associated with delays in obtaining medically-necessary abortions, the court concludes that the claim based upon this theory survives the attorney general defendants' motion to dismiss.

[44]Again, as explained above, the court assumes for the sake of addressing the plaintiffs' challenge to this requirement that the emergency exception is constitutional.

risk rises to a level of "serious risk of substantial and irreversible impairment of a major bodily function" of the woman.

In light of this distinction between the two abortion statutes, and the previously-discussed requirement that post-viability regulations not impose an impermissible trade-off between maternal health and fetal survival, the court concludes that the plaintiffs' challenge to the second-physician-attendance provision in the Alabama post-viability abortion statute survives the attorney general defendants' motion to dismiss.

Regarding the plaintiffs' allegations concerning the remaining requirements of the post-viability abortion statute, that a second physician concur in the necessity for the abortion, and that it be performed in a hospital, the court is aware of no instances in which the Supreme Court has addressed these types of provisions specifically in the context of post- viability abortions.[45] Rather, the Court has struck down second-

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[45]The district court in Voinovich did assess the constitutionality of a second physician concurrence provision in the post-viability context. See 911 F.Supp. at 1087-88. The court held that the plaintiff had demonstrated a substantial likelihood of success of establishing that the provision was unconstitutional, in view of the Supreme Court's decision in Doe v. Bolton, 410 U.S. 179, 199, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973). In Bolton, however, as explained below, the Court did not specifically address post-viability abortion regulations, but instead applied the Roe analytic scheme to regulations that governed all second- trimester abortions. Thus, this court is not convinced, as was the Voinovich district court, that the Bolton holding is dispositive in the post-viability realm.

Moreover, the Sixth Circuit, in affirming the district court's holding in Voinovich, did not reach this issue because it had already invalidated the entire post-viability abortion ban and regulations on the basis of infirmities in the medical necessity and emergency

physician-concurrence and hospitalization provisions that were directed generally to both pre and post-viability abortions under the Roe trimester- based analytic framework. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-39, 103 S.Ct. 2481, 2495-97, 76 L.Ed.2d 687 (1983) (striking hospitalization provision governing all second-trimester abortions); Ashcroft, 462 U.S. at 481-82, 103 S.Ct. at 2520 (same); Doe v. Bolton, 410 U.S. 179, 199, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973) (striking second-physician-concurrence provision applying to all abortions). The Supreme Court's holdings in these cases, therefore, are not dispositive of the instant dispute, because the standard applied by the Court did not take into account the state's strong post-viability interest in preserving potential life. Nonetheless, the Court's discussion of the pitfalls of hospitalization and second physician-concurrence provisions in the foregoing decisions is relevant to this court's determination of the constitutionality of the analogous provisions of Alabama's post-viability abortion statute.

As far as hospitalization requirements are concerned, the Supreme Court in Akron invalidated the one at issue in that case because, among other reasons, it found that the requirement that all second-trimester abortions be performed in hospitals, as opposed to outpatient clinics, imposed a substantial financial burden, and, in cases where travel would be required, additional health risks on a woman seeking an abortion.[46] Akron, 462 U.S. at 434- 35, 103 S.Ct. at 2495. The Court based these findings on data indicating that hospital-based abortions could cost more than twice as much as those

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exceptions. See Voinovich, 130 F.3d at 206.

[46]The Akron Court also found that the hospitalization requirement did not further the state's legitimate interest in preserving and protecting maternal health because advances in medical technology had made certain outpatient clinic abortions as safe as those performed in hospitals. Id., 462 U.S. at 437, 103 S.Ct. at 2496. This rationale, however, is at most remotely relevant to the Alabama statute at issue here, because it is the state's stronger interest in potential life that the hospitalization provision is designed to promote, according to the attorney general defendants.

performed in clinics, and evidence that few hospitals performed second-trimester abortions, increasing the likelihood that women would have to travel to find available facilities. Id.

The plaintiffs' allegations regarding the hospitalization requirement in the Alabama act echo the concerns of the Supreme Court in Akron. For instance, the plaintiffs allege that there is a shortage of hospitals that provide post- viability abortion services in Alabama, rendering compliance with this provision impossible or prohibitively expensive in certain circumstances, effectively denying some women any opportunity to obtain a desired--and sometimes medically necessary--post-viability abortion.

The court recognizes that the foregoing concerns expressed by the Supreme Court and the plaintiffs regarding the hospitalization requirements, to the extent that they do not focus on whether the requirements interfere with physicians' medical judgment regarding the necessity for a post- viability abortion, or whether they force an impermissible trade-off between women's health and fetal survival, are not relevant to the post-viability analysis undertaken here. Rather, insofar as these concerns focus on the obstacles erected by the hospitalization requirements to women seeking abortions, they are relevant to the undue burden analysis that is appropriate only in the context of pre-viability regulations. Despite this fact, the court nonetheless concludes that the plaintiffs have stated a claim that the hospitalization provision is unconstitutional. The precise basis for this conclusion bears further discussion.

As stated, one of the Supreme Court's grounds for invalidating the hospitalization requirement in Akron was that it would require women who sought post-viability abortions to travel to find facilities that would perform such abortions, and therefore to face any attendant health risks due to the resulting delay. This scenario, according to the plaintiffs' allegations, could also arise as a result of hospitalization requirement in Alabama's post- viability

abortion statute. If the plaintiffs demonstrate that this scenario is indeed a real possibility, they could prevail on their claim that the provision is unconstitutional because it imposes an impermissible trade-off between women's health and fetal survival, in violation of the Thornburgh standard. The reason for this is as follows: a woman who is in medical need of a post-viability abortion, and faces an increased risk to her health or life if the abortion is delayed due to travel, will nonetheless be compelled to travel to a hospital and incur the additional risk in order to have the abortion legally performed. The sole escape hatch would open only if a medical emergency arose, such that the woman faced death or a "serious risk of substantial and irreversible impairment" of her health.[47] This would indeed constitute a trade-off between maternal health and fetal survival, and would, in those cases where the physician deems an immediate abortion in an outpatient clinic to be less risky to the pregnant woman than one performed in a hospital at a later date, impede the physician's ability to ensure that maternal health remain his paramount consideration. Accordingly, the court concludes that this claim survives the attorney general defendants' motion to dismiss.

Regarding the final challenged procedural requirement, that the physician obtain the concurrence of a second physician in the necessity for the abortion, the court reiterates that in Bolton, the Supreme Court struck down a somewhat analogous statutory requirement that physicians performing abortions obtain the concurrence of two additional doctors that the abortion is medically necessary. See 410 U.S. at 198-200, 93 S.Ct. at 750-751. Noting that the defendants had cited no other voluntary medical procedure subjected by the state to such a two-physician concurrence provision, the Court faulted this requirement as lacking any rational connection to the patient's needs and as unduly infringing on the physician's right to practice. Id. at 199, 93 S.Ct. at 751.

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[47]Once again, as explained more fully above, the court assumes for the sake of addressing the plaintiffs' claim that the medical exception provision passes constitutional muster.

Importantly, as noted above, the abortion statute struck down in Bolton regulated pre-viability, as well as post-viability, abortions, and so the Court did not account for the state's strong post-viability interest in potential life when it invalidated the two-doctor concurrence requirement. By contrast, this court must evaluate the Alabama post-viability abortion statute in relation to the state's compelling interest, and so will uphold this provision so long as it reasonably furthers' that interest, see Ashcroft, 462 U.S. at 487, 103 S.Ct. at 2523, unless the plaintiffs can show that it impedes the attending physician's ability to ensure that maternal health remains his paramount consideration.

In view of the Bolton Court's misgivings about requiring doctors to obtain concurring opinions concerning the necessity of performing an abortion, this court is unwilling to conclude, as a matter of law, that the Alabama statute's second physician concurrence provision reasonably furthers the state's interest in potential life without impermissibly undermining the attending physician's ability to devote his primary attention to safeguarding the pregnant women's health. If the plaintiffs can establish that this provision unduly increases the medical risks faced by women who require post- viability abortions by, for instance, imposing substantial delays on the process or discouraging certain physicians from performing such abortions, they may prevail on the merits of this challenge at trial.[48] Accordingly, the court finds that the plaintiffs have stated a claim regarding the alleged unconstitutionality of the Alabama post-viability abortion statute's second-physician-concurrence requirement.

VI. CONCLUSION

For the foregoing reasons, the court will deny the motion to dismiss filed by the governor. The court will grant

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[48]Needless to say, the court takes no position concerning whether facts such as these would actually permit the plaintiffs to prevail on this issue on the merits. Rather, these examples are offered purely to explain the court's conclusion that this challenge survives the attorney general defendants' motion to dismiss.

the attorney general defendants' motion to dismiss to the following extent: (a) as to all of the plaintiffs' claims to the extent that the plaintiffs seek issuance of an injunction against the operation and enforcement of the challenged Alabama abortion statutes (Complaint ¶¶ 81 through 84); and (b) as to the plaintiffs' claim that the post-viability statute is unconstitutionally vague with respect to how physicians are to determine whether a fetus is viable (Complaint ¶¶ 75 & 76).

The court will deny the attorney general defendants' motion to dismiss to the extent the plaintiffs allege the following: (a) that the post-viability statute is unconstitutionally vague as to how physicians are to determine whether an abortion is necessary to prevent the death of the woman or the substantial and irreversible impairment of her health (Complaint ¶¶ 75 & 76); (b) that the post-viability statute is unconstitutionally vague as to how physicians are to determine whether a medical emergency prevents compliance with the statute's procedural requirements for conducting and documenting the abortion (Complaint ¶¶ 77 & 78); (c) that the partial-birth abortion statute is unconstitutional even if limited to post-viability abortions because it lacks any exception for preserving maternal health (Complaint ¶¶ 69 & 70); (d) that the partial birth abortion statute is unconstitutional because its civil liability provisions impose an undue burden on women seeking pre-viability abortions (Complaint ¶¶ 71 through 74); and (e) that the post-viability statute is unconstitutional because it impermissibly forces a "trade-off" between the woman's health and fetal survival, and fails to ensure that maternal health remain the physician's paramount concern (Complaint ¶¶ 77 & 78).

In addition, the court will certify the following questions to the Supreme Court of Alabama pursuant to Rule 18 of the Alabama Rules of Appellate Procedure: (a) What is the meaning of "living fetus" as that term is used in the definition of "partial-birth abortion" provided in § 26-23-2(3) of the partial-birth abortion statute? (b) What specific abortion procedures constitute "partial-birth abortions" as that term is defined in § 26-23-2(3) of the partial-birth abortion statute

and so are banned in § 26-23-3 of the statute? More specifically, which, if any, of the abortion techniques set forth in ¶¶ 36 through 41 of the plaintiffs' complaint, namely traditional dilation and evacuation, intact dilation and evacuation, saline induction, urea induction, prostaglandin induction, hysterotomy and hysterectomy, are proscribed by the statute because they constitute "partial-birth abortions"? (c) In "viability testing" under § 26-22-4 of the post-viability statute does fetal age, for purposes of determining whether a woman is past "her first 19 weeks of pregnancy," commence with fertilization or the first day of the woman's last menstrual period?

Finally, the court will deny the attorney general defendants' motion to dismiss to the extent the plaintiffs allege the following claims, but with leave to renew the motion to dismiss if appropriate after the Alabama Supreme Court has answered the certified questions: (a) that the partial-birth abortion statute is unconstitutionally vague as to which types of abortion procedures it proscribes (Complaint ¶¶ 63-64); (b) that the partial-birth abortion statute is unconstitutionally vague as to what is meant by a "living fetus" (Complaint ¶¶ 63-64); (c) that the post-viability statute is unconstitutionally vague as to when fetal age, for purposes of determining whether a woman is past "her first 19 weeks of pregnancy," commences; and (d) that the partial-birth abortion statute unconstitutionally imposes an undue burden on women seeking pre-viability abortions, to the extent that it prohibits the most common and safest abortion procedures, and to the extent that it imposes a substantial obstacle on women's choice of abortion method (Complaint ¶¶ 67 & 68).

An appropriate order will be entered.

APPENDIX C

SUMMIT MEDICAL ASSOCIATES, P.C., et al., Plaintiffs,

v.

Fob JAMES, Jr., et al., Defendants.

No. CIV. A. 97-T-1149-N.

United States District Court,

M.D. Alabama,

Northern Division.

March 19, 1998.

ORDER

MYRON H. THOMPSON, Chief Judge.

This lawsuit, in which the plaintiffs, Alabama-based providers of abortion services, challenge the constitutionality of two recently-enacted Alabama abortion statutes under the fourteenth amendment to the United States Constitution, is presently before the court on a motion to stay proceedings pending appeal, filed by defendants Bill Pryor, the Attorney General of the State of Alabama, and Ellen Brooks, the Montgomery District Attorney, (collectively, the "attorney general defendants"). The attorney general defendants seek a stay of all proceedings before this court, pending resolution of their appeal of this court's order, entered January 26, 1998, denying the attorney general defendants' motion to dismiss on the ground of eleventh amendment immunity. See Summit Medical Assocs. v. James, 984 F.Supp. 1404 (M.D.Ala.1998). For the reasons that follow, the court will grant the attorney general defendants' motion and stay all proceedings in this cause pending appeal.

I. BACKGROUND

The facts of this lawsuit, as alleged by the plaintiffs, are set out in the court's memorandum opinion entered January 26, 1998. In brief, the plaintiffs' challenges are leveled against two Alabama abortion statutes. The first is the Alabama Partial-Birth Abortion Ban Act of 1997, 1975 Ala.Code §§ 26-23-1 to 26-23-6 (Law.Co-op.Supp.1997), which took effect on August 1, 1997, and proscribes what it terms "partial-birth abortions," except under certain medical emergency circumstances. The second statute, the Alabama Abortion of Viable Unborn Child Act, 1975 Ala.Code §§ 26-22-1 to 26-22-4 (Law.Co- op.Supp.1997), took effect on August 12, 1997, and proscribes abortions performed after the fetus has achieved "viability." The plaintiffs seek declaratory and injunctive relief and have named as defendants the Governor of the State of Alabama, the Attorney General of the State of Alabama, and the Montgomery District Attorney, in her official capacity and as a representative of the class of district attorneys for the State of Alabama.

On September 4, 1997, the governor and the attorney general defendants filed separate motions to dismiss the lawsuit. The only issue raised in these motions relevant to the present motion to stay proceedings is the attorney general defendants' argument that the lawsuit must be dismissed in its entirety because the plaintiffs' claims are barred by the eleventh amendment to the United Stated Constitution, which immunizes all of the named defendants from suit. In its memorandum opinion and order dated January 26, 1998, the court rejected this argument and held that it may exercise jurisdiction over the plaintiffs' claims because they fall within the longstanding exception to eleventh amendment immunity, first articulated by the United States Supreme Court in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law. See Summit Medical Assocs., 984 F.Supp. at 1420-25. For purposes of the present motion, a brief discussion of the grounds for this holding is warranted.

In essence, the attorney general defendants proffered

two primary arguments in support of their motion to dismiss on eleventh amendment grounds. First, they contended that although the plaintiffs seek purely prospective relief against the defendants, and so this lawsuit arguably falls within the purview of the Ex parte Young doctrine, the specific relief sought is sufficiently intrusive and connected to the state itself that the 'fiction' worked by that doctrine is inapplicable here. Their second primary argument was grounded on the Ex parte Young doctrine's requirement that the challenged conduct of the state officials be 'ongoing' or 'continuing,' and not merely 'threatened,' for the exception to apply. The attorney general defendants maintained that the plaintiffs face, at most, a speculative threat of prosecution under the statutes, and that consequently their claims do not qualify for the Ex parte Young exception.

The court rejected both of these arguments, and held instead that this lawsuit conforms to the prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law. Summit Medical Assocs., 984 F.Supp. at 1422. Furthermore, the court concluded that the plaintiffs had alleged the requisite 'ongoing or continuing violation' of their constitutional rights, by contending that they face a continuing threat of prosecution and civil liability under the two challenged abortion statutes, in view of the governor and attorney general's indication that they intend to prosecute violations of the two statutes. Id. at 1423. In reaching its decision, the court emphasized that as a consequence of the ongoing threat of prosecution the plaintiffs cannot freely exercise their asserted constitutional rights without fear of arrest, prosecution, or being haled into court pursuant to the acts' civil provisions. Finally, the court also remarked that to the extent that the attorney general defendants take the position that the plaintiffs must await a state criminal prosecution to secure their desired relief, their argument flies in the face of one of the central rationales underlying the Ex parte Young decision, namely that the plaintiffs should not be compelled to await a state court criminal prosecution, with its attendant risk of heavy sanctions, to vindicate their constitutional rights. Id. at 1424-

25.

On February 13, 1998, the attorney general defendants filed a timely notice of appeal from this court's denial of their motion to dismiss on the grounds of eleventh amendment immunity. On that same date, they filed the motion to stay proceedings that is presently before the court. The court held a telephone conference concerning this motion on March 5, 1998.

II. DISCUSSION

A.

As both parties recognize, a court of appeals may exercise jurisdiction over an interlocutory appeal by a defendant from a denial of a motion to dismiss grounded on a claim of eleventh amendment immunity. See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). Among the reasons underlying this principle is the notion that "the value to the States of their Eleventh Amendment immunity ... is for the most part lost as litigation proceeds past motion practice." Id. at 145, 113 S.Ct. at 688. Thus, providing state and state-official defendants with swift access to appellate review of denials of eleventh-amendment-immunity claims acknowledges that the principal benefits of eleventh amendment immunity to suit--namely "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial"--perish irretrievably when a case is erroneously permitted to proceed to trial. Id. at 143-44, 113 S.Ct. at 687.

These same considerations also favor granting a stay of the trial court proceedings pending resolution of such an interlocutory appeal, as the Seventh Circuit--the only court of appeals to have addressed this question--recently held in Goshtasby v. Board of Trustees of Univ. of Ill., 123 F.3d 427 (7th Cir.1997). In Goshtasby, the Seventh Circuit extended to the eleventh- amendment-immunity context the reasoning underlying its prior decision in Apostol v. Gallion, 870 F.2d 1335 (7th Cir.1989), which held that a stay of proceedings in

the district court is required where a public official takes an interlocutory appeal to assert a non-frivolous claim to absolute or qualified immunity. As the Goshtasby court explained,

"Our reason [for requiring a stay in Apostol] was not any formal division of 'jurisdiction' between trial and appellate courts--for an appeal from an interlocutory order may endow both courts with authority over discrete portions of the case--but the fact that immunity gives a public official a 'right not to be sued' as well as a right to win on the merits.... [I]f the defendant is correct that it has immunity, its right to be free of litigation is compromised, and lost to a degree, if the district court proceeds while the appeal is pending. Just so with an appeal by a state under the eleventh amendment."

123 F.3d at 428 (emphasis added).

Although, for the foregoing reasons, a stay of trial court proceedings is appropriate pending a colorable appeal taken by a state official on eleventh-amendment-immunity grounds, when the appeal is plainly frivolous, as where the claim of immunity is a sham and asserted solely for the purpose of delay, the trial court need not halt the proceedings. As the Apostol court recognized, "Courts are not helpless in the face of manipulation. District judges lose power to proceed with trial because the defendants' entitlement to block trial is the focus of the appeal. If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks." 870 F.2d at 1339. See also Chuman v. Wright, 960 F.2d 104, 105 (9th Cir.1992) (holding that the district court may certify as frivolous interlocutory appeals on immunity grounds, and proceed to trial); accord Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir.1991); Stewart v. Donges, 915 F.2d 572, 576-78 (10th Cir.1990).

Although the Eleventh Circuit Court of Appeals has not yet addressed the present question of whether a stay should be granted pending a non-frivolous appeal on eleventh-amendment-immunity grounds, the court perceives no reason why that court would not adopt the rationale underlying the Seventh Circuit's Goshtasby decision and hold

that a stay is warranted under these circumstances. As the attorney general defendants point out, the Eleventh Circuit has noted that eleventh amendment immunity is "a threshold issue" which should be resolved at an early stage of the proceedings, and that the eleventh amendment "is a recognition that the states retain certain attributes of sovereignty, and one of its purposes is to protect states from the indignity of being haled into federal court by private litigants." In re Bouchard Transp. Co., 91 F.3d 1445, 1448 (11th Cir.1996) (citing Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S.Ct. at 687). The Eleventh Circuit in Bouchard reversed the district court's decision to order a state agency to participate in mediation without first addressing the agency's claim of eleventh amendment immunity from suit. 91 F.3d at 1449. Because the considerations underlying Bouchard also favor the granting of a stay pending an interlocutory appeal based on eleventh amendment immunity, as previously explained, it is reasonable to conclude that the Eleventh Circuit, if confronted by the present issue, would require that a stay be granted absent a finding that the appeal is frivolous.

For the foregoing reasons, this court concludes that unless it finds that the attorney general defendants' appeal is wholly frivolous and brought solely for purposes of delay, a stay of all proceedings in this court pending resolution of the appeal is appropriate.

B.

The parties do not contest the applicability of the foregoing authorities to the present issue. Instead, their dispute arises over whether the attorney general defendants' appeal is frivolous and brought solely for purposes of delay. The plaintiffs contend that because this lawsuit falls squarely within the exception to sovereign immunity carved out by Ex parte Young, as this court held in its January 13, 1998, memorandum opinion, there is no non-frivolous basis upon which the attorney general defendants may assert on appeal that the plaintiffs' suit is barred by the eleventh amendment. The attorney general defendants counter by reiterating their argument, which was previously rejected by this court, that

the plaintiffs have failed to satisfy Ex parte Young 's 'ongoing or continuing violation' requirement, because no individual is or has ever been the target of an imminent prosecution under the two challenged abortion acts.

The court holds that the attorney general defendants' appeal is not frivolous. However, because the eleventh amendment issue presented by this lawsuit appears to have engendered some confusion, as evidenced by the attorney general defendants' arguments proffered in support of their stay motion, the court offers a few additional words on the question of the applicability of the Ex parte Young doctrine to this suit.

As a threshold matter, the court emphasizes once again its holding that this lawsuit falls squarely within the Ex parte Young exception to eleventh amendment immunity. As the court explained in its January 26, 1998, memorandum opinion, the plaintiffs here seek purely prospective relief against state officials in their official capacities, and the requested relief is calculated to prohibit the officials from enforcing allegedly unconstitutional state enactments. Summit Medical Assocs., 984 F.Supp. at 1422. Thus, this lawsuit conforms to the prototypical case contemplated by Ex parte Young and its progeny, in terms of the nature of the relief sought. Id. In no way do the plaintiffs seek retrospective relief in any form, nor do they attempt to wrest control of a vital state resource permanently away from Alabama, thus impermissibly offending the state's sovereignty, as the Supreme Court found to be the case in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Summit Medical Assocs., 984 F.Supp. at 1421-22.

The principal source of confusion in this case stems not from the foregoing considerations, but rather from the attorney general defendants' attempt to establish that the plaintiffs have failed to satisfy what the parties and court have been referring to as Ex parte Young 's 'ongoing or continuing violation' requirement. Accordingly, the court will focus its discussion here on this particular facet of the eleventh amendment issue.

Unquestionably, the Supreme Court has emphasized that only 'ongoing' or 'continuing' alleged violations of federal law by a state official trigger the application of the Ex parte Young exception. See, e.g., Coeur d'Alene, 521 U.S. at ----, 117 S.Ct. at 2043 ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court.") (emphasis added); Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986) (noting that Ex parte Young "has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past") (emphasis added); Green v. Mansour, 474 U.S. 64, 67-68, 106 S.Ct. 423, 425-426, 88 L.Ed.2d 371 (1985) ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.") (emphasis added). However, in asserting that the plaintiffs here cannot allege the requisite 'ongoing or continuing' federal law violation because no non-conjectural threat of prosecution or civil liability presently exists, the attorney general defendants misconstrue how these terms are employed by the Supreme Court in the eleventh-amendment-immunity context. Specifically, as the court noted in its previous memorandum opinion, see Summit Medical Assocs., 984 F.Supp. at 1422-24, and as it explains in more detail below, the attorney general defendants impermissibly seek to inject into the eleventh amendment analysis considerations that are applicable only to the separate questions of whether the plaintiffs have satisfied the Article III case-or-controversy requirement and whether the court, under principles of equity jurisprudence, should exercise jurisdiction over the plaintiffs' claims for declaratory and injunctive relief.

To fully appreciate how the attorney general defendants have misconstrued the 'ongoing and continuing violation' requirement, one must understand the relationship between this requirement, the concerns of federalism and comity that underlie the Ex parte Young doctrine, and the distinct justiciability and equity considerations that

circumscribe federal courts' ability to exercise jurisdiction over plaintiffs' claims for relief against the allegedly unconstitutional enforcement of state enactments. A useful scheme for analyzing this relationship emerges when one focuses on the type of federal-law violation that is alleged in a particular lawsuit, because, as will be shown, different considerations apply depending on the nature of the alleged violation.

For purposes of the present analysis, alleged violations of federal law by state officials may be described as falling within one or more of three separate categories, specifically 'past/completed,' 'ongoing or continuing,' and 'speculative/conjectural.' The relationship between these three categories of alleged federal-law violations may be depicted in schematic form as follows:

The first category, 'past/completed,' refers to violations by state officials that have occurred only in the past; that is, violations based upon conduct that entirely pre-dates and does not extend beyond the initiation of the plaintiffs' lawsuit. The second category, 'ongoing or continuing,' is employed here as it consistently has been employed by the Supreme Court in the eleventh-amendment-immunity context, namely to refer to violations that do not entirely pre-date the initiation of the lawsuit. In other words, this court, like the Supreme Court, defines 'ongoing or continuing' in direct contradistinction to 'past/completed' violations, the cardinal difference between the two categories being that the former refers to infractions that did not take place wholly in the past. See Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940 ("Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past.") (emphasis added). The third, and final, category, 'speculative/conjectural,' denotes violations that have not commenced at the time of filing, and for which there is no credible threat of future occurrence, beyond mere speculation or conjecture. Thus, where an alleged violation is taking place at the time that the lawsuit is initiated, or where there is a real and immediate threat that a violation of federal law

will occur in the near future, the lawsuit involves an 'ongoing or continuing' violation. By contrast, where the plaintiffs cannot establish a credible threat of future violation, so that the court finds the putative threat to be merely hypothetical or imaginary, the suit alleges a 'speculative/conjectural' violation of federal law.

In addition to these three categories of alleged federal law violations, two vertical lines are depicted in the schematic diagram. One line separates 'past/completed' from 'ongoing or continuing' violations, while the second line separates the latter from 'speculative/conjectural' violations. As will be shown, while the issues associated with each of these lines are implicated by the present lawsuit, the appeal on eleventh-amendment-immunity grounds raises only the issues pertaining to the first line of the schematic diagram. Moreover, any confusion in this suit regarding whether the plaintiffs have satisfied the 'ongoing or continuing violation' requirement may be traced to the attorney general defendants' conflation of the distinct issues associated with the diagram's two lines.

i. The First Vertical Line: Eleventh Amendment Sovereign Immunity Considerations

The determination of where a lawsuit falls in relation to the first line on the court's schematic diagram, which separates 'past/completed' from 'ongoing or continuing' violations, governs whether the Ex parte Young exception to eleventh amendment immunity permits plaintiffs to bring the lawsuit against state officials in federal court. As stated, the Supreme Court has made it clear that only lawsuits in which 'ongoing or continuing' violations of federal law are alleged, as opposed to those alleging violations that occurred solely in the past, do not run afoul of the comity and federalism concerns that lie at the heart of the eleventh amendment, and therefore do not exceed the permissible boundaries of the Ex parte Young exception.

The Supreme Court has, in several decisions, explained why the applicability of the Ex parte Young exception turns on whether or not the alleged violations of

federal law occurred wholly in the past. The Court's observations in two such decisions, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-06, 104 S.Ct. 900, 909-11, 79 L.Ed.2d 67 (1984) and Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940, are particularly illuminating, and so warrant further examination here.

In Pennhurst, the Supreme Court addressed the question of whether a claim that state officials violated state law is one against the state and therefore barred by the eleventh amendment. 465 U.S. at 103, 104 S.Ct. at 909. In the course of deciding this question, the Court addressed in some detail the rationale underlying the Ex parte Young doctrine, and made the following observations, which shed some light on the issue presently before this court. The Pennhurst Court first remarked that the doctrine, despite its transparently fictional quality, "has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " Id. at 105, 104 S.Ct. at 910 (quoting Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454). However, the Court was quick to add that it had recognized that this need "must be accommodated to the constitutional immunity of the States," and therefore that in prior instances it had "declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate" that immunity. Id.

Thus, the Supreme Court recognized that it had established a fundamental distinction for eleventh-amendment-immunity purposes between prospective and retroactive relief. This distinction, according to the Court, "fulfills the underlying purpose of Ex parte Young while at the same time preserving to an important degree the constitutional immunity of the States." Id. at 106, 104 S.Ct. at 911. In other words, by permitting application of the Ex parte Young exception only where the relief sought against state officials is prospective, rather than where plaintiffs seek compensation for a past violation of federal law, the Court believed that it had achieved the proper balance between competing state and federal interests.

In Papasan, the Supreme Court further elaborated

on the necessity of achieving such an equilibrium. Papasan contains what is perhaps the Court's clearest explanation of the relationship between the 'ongoing or continuing violation' requirement and what this court terms 'past/complete' conduct. Remarking once again upon the proper boundaries for application of the Ex parte Young doctrine, the Papasan Court made the following pertinent observations:

"We have ... described certain types of cases that formally meet the Young requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies. Young 's applicability has been tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. Consequently, Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.... Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."

Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940 (internal quotation marks and citations omitted). Thus, the Papasan Court unambiguously explained that the term 'ongoing,' as employed in the eleventh-amendment- immunity context, refers to an alleged violation that did not take place entirely in the past. As the Court explained, permitting a suit for such a violation in federal court would serve to compensate individuals for previously incurred damages, or to deter states from violating federal law by holding out the threat of such liability for future transgressions, neither of which is a sufficient interest to overcome the dictates of the eleventh amendment. Id. at 278, 106 S.Ct. at 2940.

Thus, as the Supreme Court's decisions in Pennhurst and Papasan demonstrate, the principles of state sovereign immunity embodied in the eleventh amendment are offended--and the Ex parte Young exception is stretched beyond the breaking point--when plaintiffs attempt to challenge state officials' acts that have taken place wholly in the past. The reason for this is quite simple: such challenges, by their very nature, implicate retroactive, as opposed to prospective, relief, including monetary damages, and therefore must be barred from federal court if the eleventh amendment "is to be conceived of as having any present force." Edelman v. Jordan, 415 U.S. 651, 665, 94 S.Ct. 1347, 1357, 39 L.Ed.2d 662 (1974). In this sense, the Supreme Court employs the terms 'ongoing' and 'continuing' as a short-hand reference to alleged violations that may be remedied through an award of prospective relief to end current, or prevent future, injury to plaintiffs' federally-protected rights, as opposed to violations that may be remedied only by an award of retroactive relief calculated to compensate plaintiffs for injuries suffered in the past.

Returning to its schematic diagram, the court re-iterates that the foregoing discussion was focused on the first vertical line, which separates 'past/completed' from 'ongoing or continuing' violations. As explained, when the state officials' challenged actions have only taken place in the past, and thus the lawsuit falls on the 'past/complete' side of the line, principles of federalism and comity preclude the application of the Ex parte Young exception because the federal interests vindicated, namely the awarding of compensation for past damages and the possible deterrence of future violations of federal strictures, do not justify the injury to state sovereign rights inflicted by the exception. By contrast, a different outcome, favoring application of the exception, arises where the alleged violations fall on the 'ongoing or continuing' side of the first vertical line, because an exercise of federal jurisdiction under such circumstances would carry only prospective force, and therefore would vindicate federal interests while according sufficient deference to the state's sovereign immunity.

Thus, if the court finds that the plaintiffs' lawsuit falls on the 'ongoing or continuing' side of the first line of

the schematic diagram, in light of the foregoing considerations, the Ex parte Young exception is applicable, and any subsequent analysis no longer revolves around the eleventh amendment. Instead, at this point the court leaves the domain of the eleventh amendment and moves on to the diagram's second line, to determine whether the alleged violations of federal law are speculative or conjectural. This determination is the focus of the next section of this order.

ii. The Second Vertical Line: Article III and Equity Considerations

The analysis associated with the second line on the court's schematic diagram, which separates the 'ongoing or continuing' and 'speculative/conjectural' categories of alleged violations, involves a very different set of constitutional doctrines from those just discussed in relation to the first vertical line. Specifically, the assessment of where a lawsuit falls with respect to the second line determines whether the plaintiffs have met the Article III standing requirement, as well as whether the court should, under traditional principles of equity, exercise jurisdiction over the plaintiffs' requests for declaratory and injunctive relief.

As the court explained in its January 26, 1998, memorandum opinion, Article III's standing requirement imposes an additional constitutional barrier, distinct from that erected by the eleventh amendment, to litigants who attempt to bring suit in federal court. See Summit Medical Assocs., 984 F.Supp. at 1423-24, 1425. This requirement is satisfied only if the party alleges that it has suffered an actual or threatened injury as a result of the defendant's actions. See id. at 1426. Where, as here, the lawsuit challenges a state criminal enactment, to establish standing the plaintiffs must allege " 'an intention to engage in a course of conduct arguably infected with a constitutional interest, and [that] there exists a credible threat of prosecution thereunder." ' Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979)).

It is the latter aspect of this requirement, the demonstration of a credible threat of prosecution, that is at

issue at the second vertical line of the court's schematic diagram. As the court explained in its previous memorandum opinion, a credible threat cannot be merely imaginary or speculative, but must be "real and immediate." See id. Thus, if the alleged violation falls on the 'speculative/conjectural' side of the second line, a federal court may not exercise jurisdiction over the plaintiffs' claim, under basic principles of standing. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 103 S.Ct. 1660, 1667, 75 L.Ed.2d 675 (1983) (holding that plaintiffs lacked standing because they failed to allege a credible threat of injury, where the recurrence of such injury depended upon two speculative events); Golden v. Zwickler, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (holding that plaintiff lacked standing because it was "wholly conjectural" that any future prosecutions would be advanced against him under a challenged statute). However, where, as the court found to be the case here, the plaintiffs establish a credible threat of prosecution by alleging that their conduct falls within the proscriptions of the challenged statutes and that the state officials stand ready to enforce the statutes against them, the standing hurdle has been surmounted, and the court may exercise jurisdiction over the plaintiffs' claims.

In addition to the standing issue, the second vertical line on the court's schematic diagram has significance with respect to the separate question of whether the court may exercise its jurisdiction over the plaintiffs' claims for equitable relief. As the Supreme Court has observed, the considerations governing whether the standing requirement has been satisfied "obviously shade into those determining whether the complaint states a sound basis for equitable relief." O'Shea v. Littleton, 414 U.S. 488, 499, 94 S.Ct. 669, 677, 38 L.Ed.2d 674 (1974). Thus, in the present context of a challenge to state criminal statutes, the plaintiffs must demonstrate the existence of a credible threat of prosecution under the statutes not only to establish their standing to sue, but also to qualify for federal injunctive relief. See Morales v. Trans World Airlines, 504 U.S. 374, 381-383, 112 S.Ct. 2031, 2035-36, 119 L.Ed.2d 157 (1992).

Unfortunately, the attorney general defendants fail to recognize that the relevance of this determination of

whether a credible threat of enforcement exists is restricted to the standing and equity considerations that arise at the second vertical line of the court's schematic diagram, and does not extend to the eleventh-amendment-immunity issue associated with the first vertical line and raised by their appeal to the Eleventh Circuit. This misapprehension of the governing law is most evident in the attorney general defendants' reliance upon the Supreme Court's decision in Morales to support their contention that the plaintiffs have failed to satisfy Ex parte Young ' s 'continuing or ongoing violation' requirement because they have not demonstrated the existence of a credible threat of prosecution under the challenged abortion statutes. Morales, as will be shown, pertains only to the equitable-relief issue, and not at all to the question of whether the eleventh amendment bars certain lawsuits against state officials. Consequently, the attorney general defendants improperly blend two distinct and unrelated concepts when they rely upon Morales to establish that the plaintiffs suit does not fall within the Ex parte Young exception to eleventh amendment immunity.

In Morales, the Court considered the scope of federal injunctive relief available where plaintiffs challenge state regulations that they claim to be pre-empted by federal law. The Morales Court vacated the injunction entered below by the district court to the extent that it restrained the operation of challenged state laws with respect to matters that were outside the specific obligations that several state attorneys general had threatened to enforce against the plaintiffs. 504 U.S. at 381-383, 112 S.Ct. at 2035-36. In reaching its decision, the Morales Court addressed the propriety of granting federal injunctive relief where state enactments are being challenged, in an extended discussion that the attorney general defendants have quoted at length in their brief in support of their stay motion. The pertinent passage reads, in part, as follows:

"It is a ' "basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." ' O'Shea v. Littleton, 414 U.S. 488, 499, 94 S.Ct. 669, 677-678, 38 L.Ed.2d 674 (1974); Younger v. Harris, 401 U.S. 37, 43-44, 91 S.Ct. 746, 750-751,

27 L.Ed.2d 669 (1971). In Ex parte Young, 209 U.S. 123, 156, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908), we held that this doctrine does not prevent federal courts from enjoining state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution.' When enforcement actions are imminent--and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses--there is no adequate remedy at law. See id., at 145-147, 163-165, 28 S.Ct., at 447-449, 455-456....

"In suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury. See Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 240-241, 73 S.Ct. 236, 238-239, 97 L.Ed. 291 (1952). Ex parte Young thus speaks of enjoining state officers 'who threaten and are about to commence proceedings,' 209 U.S., at 156, 28 S.Ct., at 452 (emphasis added); see also id., at 158, 28 S.Ct., at 453, and we have recognized in a related context that a conjectural injury cannot warrant equitable relief, see O'Shea, supra, 414 U.S., at 502, 94 S.Ct., at 679. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted 'any' state suit involving 'any aspect' of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters."

Morales, 504 U.S. at 381-383, 112 S.Ct. at 2035-36 (footnote omitted).

As this passage illustrates, the Morales Court did not

concern itself with whether the eleventh amendment precluded a federal-court challenge to a state enactment. Instead, as even a casual reading of the decision reveals, Morales addressed the question of whether, consistent with the "basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," the plaintiffs had alleged a sufficient threat of enforcement to establish the requisite irreparable injury and inadequacy of legal remedies so that the federal court properly could grant injunctive relief. 504 U .S. at 380-81, 112 S.Ct. at 2035.[1]

Thus, the relevance of Morales, though the Court does extensively quote from Ex parte Young,[2] does not extend beyond the equity-based considerations that arise at the second vertical line of this court's schematic diagram. In other words, the decision sheds no light on the eleventh-amendment-immunity issue associated with the first line, and the statements in Morales regarding the necessity of an imminent threat of prosecution under the challenged state statutes are pertinent only to the question of whether federal injunctive relief, under basic principles of equity, is available

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[1]In fact, this court cited Morales in its previous memorandum opinion specifically for the proposition that it must examine whether jurisdiction may be exercised over the plaintiffs' claims for equitable relief based upon the application of traditional equity principles, in an analysis that is separate from that pertaining to the eleventh amendment question that is also raised by this lawsuit. See Summit Medical Assocs., 984 F.Supp. at 1434.

[2]It is clear that the Morales Court relied upon the quoted portions of Ex parte Young to establish not that the state-sovereignty principles embodied in the eleventh amendment preclude suits against state officials in federal court, but rather as support for its conclusion that federal injunctive relief is available against state officials only when those officials actually threaten to enforce allegedly unconstitutional state enactments. See Morales, 504 U.S. at 381-83, 112 S.Ct. at 2035-36. The Morales Court was apparently not confronted with, and so did not reach, the former question.

to a plaintiff who sues state officials.

As stated, the attorney general defendants fail to recognize this fundamental limitation of Morales when they rely upon the decision to argue that the present lawsuit does not fall within the Ex parte Young exception because the plaintiffs do not allege an 'ongoing or continuing' violation of federal law. In this manner, the attorney general defendants conflate the considerations governing the first vertical line's eleventh amendment considerations and the second vertical line's equity-based considerations.[3]

The attorney general defendant's continued reliance upon another Supreme Court decision, Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926), to argue against application of the Ex parte Young exception in this lawsuit, is similarly misplaced. Despite the fact that the Fenner Court did discuss Ex parte Young in reaching its decision that federal courts may enjoin state officials from initiating criminal prosecutions only under extraordinary circumstances, an examination of the opinion establishes that the Court was not concerned at all with the question of whether the eleventh amendment barred such lawsuits. Instead, as was true in Morales, the Fenner Court addressed only the propriety of granting federal injunctive relief against an imminent state prosecution. Moreover, as this court explained in its January 26, 1998, memorandum opinion, the Supreme Court has come to employ the reasoning underlying Fenner to determine

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[3]Furthermore, regarding the question of whether a sufficient threat of enforcement has been alleged in this case--to which the Morales opinion is indeed relevant--the court re-iterates its previous conclusion that the two challenged statutes are viable, and not moribund. See Summit Medical Assocs., 984 F.Supp. at 1427, 1435. During the March 5, 1998, hearing that this court held on the stay motion, the attorney general and governor underscored this fact once again by confirming, in no uncertain terms, that any violations of the acts that come to the attorney general's attention will be subject to prosecution pursuant to the appropriate statute, even while a stay of these proceedings is in effect pending resolution of the appeal to the Eleventh Circuit.

whether federal courts should abstain from hearing lawsuits where the exercise of federal jurisdiction could potentially interfere with related state-court proceedings. See Summit Medical Assocs., 984 F.Supp. at 1433-34 & n. 16. Thus, the Court has never interpreted Fenner as providing guidance regarding whether or not the Ex parte Young exception should be applied to overcome the eleventh amendment's strictures. In addition, as this court also observed in its previous memorandum opinion, while the expansive language in Fenner may superficially appear to govern the present lawsuit, the Supreme Court has explained that Fenner is instead applicable " 'in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution for past conduct.' " Id. at 1434 (quoting Steffel v. Thompson, 415 U.S. 452, 463 n. 12, 94 S.Ct. 1209, 1218 n. 12, 39 L.Ed.2d 505 (1974) (emphasis in original)).

Thus, as the foregoing discussion indicates, the attorney general defendants' arguments regarding the plaintiffs' alleged failure to show that they face an imminent and credible threat of prosecution under the two challenged abortion statutes are completely irrelevant to the eleventh-amendment-immunity issue that they raise on appeal. Because this court has concluded that the plaintiffs' lawsuit alleges violations of federal law that have not occurred solely in the past, that is, prior to the filing of their complaint, they have satisfied the 'ongoing or continuing violation' requirement imposed by Ex parte Young, and the eleventh amendment poses no bar. By contrast, the attorney general defendants' contentions regarding the lack of an imminent prosecution are, of course, directly relevant to the distinct questions of whether the plaintiffs enjoy standing to sue in federal court and whether this court should entertain their claims for equitable relief; however, these questions, while they have been hotly disputed by the parties and were decided by the court in the plaintiffs' favor in the January 26, 1998, memorandum opinion, are not implicated by the attorney general defendants' appeal to the Eleventh Circuit.

C.

Despite its conclusion that the plaintiffs' claims fall

squarely within the Ex parte Young exception to eleventh amendment immunity, which is undisturbed by the attorney general defendants' contention that the alleged lack of a credible threat of prosecution under the statutes should bar this lawsuit from federal court, the court does recognize that the attorney general defendants have raised colorable arguments regarding the scope of the exception that have not yet been answered by any appellate court in the wake of the Supreme Court's recent decision in Coeur d'Alene. Although, as explained more fully in its memorandum opinion of January 26, 1998, this court disagrees with the attorney general defendants' expansive reading of Coeur d'Alene, it cannot conclude that they have so misinterpreted that decision that their arguments are wholly without merit and brought solely as a delay tactic. Nor does the court find frivolous the attorney general defendants' arguments regarding the 'ongoing or continuing violation' requirement under Ex parte Young and its progeny. Consequently, the court rejects the plaintiffs' argument that the attorney general defendants' appeal on eleventh amendment grounds is wholly frivolous and brought solely for purposes of delay, and finds instead that the stay motion is due to be granted.[4]

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[4]The plaintiffs also oppose the attorney general defendants' motion by arguing that no stay should be granted as to their claims against the governor, because he has not asserted an eleventh-amendment-immunity defense and thus has not joined the attorney general defendants' appeal. The court rejects this argument, however. As the attorney general defendants correctly observe, a decision by the Eleventh Circuit that the plaintiffs' claims are barred by the eleventh amendment would immunize all defendants in this lawsuit, including the governor, and therefore all of the foregoing considerations that favor granting a stay in proceedings pending resolution of the appeal apply with equal force to the claims against the governor. Like the attorney general defendants, the governor will have irretrievably lost much of the benefit of his eleventh amendment immunity should this litigation be permitted to proceed beyond its current stage to discovery and trial, only to have the Eleventh Circuit eventually reverse this court's ruling on the immunity issue.

D.

In granting the attorney general defendants' motion and entering a stay of all proceedings in this case pending appeal, the court makes two additional observations. First, the court notes that the plaintiffs have stated that they would suffer no significant harm from a delay in the proceedings before this court pending appeal, provided that the court would lift the stay to entertain any request brought by the plaintiffs for preliminary injunctive relief should any emergency matters arise. The court will indeed entertain any colorable request for such relief during the pendency of the stay, in recognition of the fact that in the abortion context, given the unique circumstances presented by a woman's pregnancy, time frequently is of the essence, because decisions must often be made quickly for purposes of preserving maternal health and physicians cannot await the judicial resolution of difficult legal issues.

Second, the court notes that both the attorney general defendants and the governor have indicated that they would not oppose any request made by the plaintiffs that the Eleventh Circuit conduct an expedited review of the attorney general defendants' appeal. It bears emphasis that such an expedited appeal would of course minimize any potential harm to any party due to a delay in the proceedings before this court.

III. CONCLUSION

For the foregoing reasons, it is ORDERED that the motion to stay proceedings pending appeal, filed by defendants Bill Pryor and Ellen Brooks on February 13, 1998, is granted, and further proceedings in this cause are stayed until the appeal taken by defendants Pryor and Brooks is resolved on the merits. Of course, this stay will not extend to any extraordinary request by the plaintiffs for a temporary restraining order, a preliminary injunction, or similar relief, the thrust of which is, among other things, to maintain the status quo or preserve the court's jurisdiction.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-6129

SUMMIT MEDICAL ASSOCIATES, P.C., on behalf of themselves and their patients' seeking abortions; WILLIAM H. KNORR, M.D., on behalf of himself and his patients seeking abortions; NEW WOMAN, ALL WOMEN HEALTH CARE, on behalf of themselves and their patients seeking abortions,

Plaintiffs-Appellees,

versus

FOB JAMES, in his official capacity as Governor for the State of Alabama and his agents and successors,

Defendant,

BILL PRYOR, in his official capacity as Attorney General for the Stateof Alabama and his agents and successors; ELLEN BROOKS, in her official capacity as Montgomery District Attorney and as representative of the class of district attorneys for the State of Alabama,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____

F.2d _____).

[Filed Sep. 22, 1999]

Before: EDMONDSON, COX, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX E

Judicial Power, U.S. Const., art. III, § 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX F

28 U.S.C. § 1291. Final Decisions of District Courts.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(Added June 25, 1948, ch. 646, 62 Stat. 929; amended Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e); 72 Stat. 348; April 2, 1982, Pub. L. 97-164, § 124, 96 Stat. 36.)